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# The Quiet Revolution Comes to Kentucky: A Case Study in Community Mediation

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# The Quiet Revolution Comes to Kentucky: A Case Study in Community Mediation

BY THOMAS J. STIPANOWICH\*

## Table of Contents

I. ORIGINS OF A MEDIATION PROGRAM .....	859
A. <i>A Word on Context</i> .....	859
1. <i>The Quiet Revolution</i> .....	859
2. <i>Harbingers of Change in the Commonwealth</i> ....	861
B. <i>A New Model</i> .....	863
1. <i>The Justice Center Task Force: A Coincidence</i> <i>of Purpose</i> .....	863
2. <i>Surveying the Territory</i> .....	865
3. <i>Why Mediation?</i> .....	868
a. <i>Potential Advantages of Mediation</i> .....	870
b. <i>Potential Concerns</i> .....	873
4. <i>What Kind of Mediation Program?</i> .....	875
a. <i>CDR Task Force Recommendations</i> .....	875
b. <i>Field Visits to Other Models of Mediation</i> ....	878
C. <i>The Mediation Center of Kentucky, Inc.</i> .....	880
II. COURT REFERRAL RULES AND PROCEDURES .....	882
A. <i>Court-Mandated Mediation</i> .....	882
1. <i>Constitutional Issues and Judicial Authority to</i> <i>Mandate Mediation</i> .....	882
2. <i>Policy Considerations; Practical Concerns</i> .....	885
B. <i>The Circuit Court Mediation Rule</i> .....	889
1. <i>Input From the Bar</i> .....	890
2. <i>Judicial Discretion</i> .....	890

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3. <i>The Obligation to Appear and the Role of Attorneys</i> .....	892
4. <i>Confidentiality</i> .....	893
III. MEDIATION CENTER RULES AND PROCEDURES .....	896
A. <i>Mediator Appointment, the Agreement to Mediate, and the Mediation Session</i> .....	896
B. <i>Preserving Confidentiality</i> .....	899
C. <i>The Mediator's Role</i> .....	899
D. <i>The Role of Attorneys</i> .....	901
IV. MEDIATOR QUALIFICATIONS AND TRAINING .....	903
V. SMALL CLAIMS MEDIATION .....	905
VI. FUNDING & SUPPORT .....	907
A. <i>The Costs of Running a Community Mediation Center</i> .....	907
B. <i>Potential Sources of Funding</i> .....	910
VII. EVALUATION OF MEDIATION EFFORTS .....	914
A. <i>Evaluation Procedure</i> .....	915
B. <i>Settlement Rates</i> .....	916
C. <i>Effectiveness of the Process</i> .....	917
D. <i>Effectiveness of Mediators</i> .....	920
E. <i>Perceptions of Agreement</i> .....	921
F. <i>Results of the Mediated Agreement</i> .....	922
G. <i>Effects of Mediation and Reasons for Mediated Agreement</i> .....	924
H. <i>Reasons for Failure to Settle, Satisfaction with the Mediation Process, and Improving the Evaluation Process</i> .....	925
VIII. THE MEDIATION CENTER REACHES OUT .....	926
IX. EDUCATIONAL EFFORTS .....	929
A. <i>Reforming the Culture of the Law School</i> .....	930
B. <i>Mediation Training in the Primary and Secondary Schools</i> .....	932
X. THE FUTURE(S) OF THE MEDIATING COMMUNITY .....	933
A. <i>Changes in the Community and the Legal Profession</i> .....	933
B. <i>Rise of the Private Entrepreneurs</i> .....	934
C. <i>Change and the Mediation Center of Kentucky: Thinking Flexibly</i> .....	936
APPENDICES .....	937

## INTRODUCTION

Reflecting on our justice system, a respected thinker recently observed: "Academics, and particularly those who theorize about jurisprudential concerns, need to root their views in the practicalities of our empirical world."<sup>1</sup> I ascribe to this principle and have gone to the field more than once in search of data on emerging trends in informal dispute resolution.<sup>2</sup> As a party to the creation of a regional mediation program, however, my primary motivation was not academic.<sup>3</sup>

The Mediation Center of Kentucky, Inc., a model community program devoted to informal resolution of issues through mediation, was borne of the shared concerns of many regarding the quality of dispute resolution, and the relative expense, inflexibility, and limited availability of relief in the legal system. Paradoxically, those at the heart of the system, judges, were among those most strongly supportive of the effort. And while the program's locale, Lexington, bears many of the aspects of a traditional small town, the scale of the community permitted decisive action by a few committed individuals (while our relative tardiness in implementing new approaches allowed us to profit from the experience of "less cautious" endeavors in other states).<sup>4</sup> The final paradox is the product: a quasi-public, independent, nonprofit program which, while enjoying the full cooperation and support of the court system, represents a continuing exercise in creative problem solving for the many communities in Lexington and the Commonwealth.

Like my fellow authors in this volume, I have forsaken the role of passive observer for that of active participant whose chronicle from the field

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<sup>1</sup> Carne Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"*, 19 FLA. ST. U. L. REV. 1, 38 (1991).

<sup>2</sup> See Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 453-77 (1988) (analyzing lawyers' perceptions of arbitration under the Rules of the American Arbitration Association); Thomas J. Stipanowich & Douglas A. Henderson, *Beyond Arbitration* (unpublished manuscript, on file with author); Thomas J. Stipanowich & Douglas A. Henderson, *Settling Construction Disputes by Mediation, Mini-Trial and Other Processes—The ABA Forum Survey*, THE CONSTRUCTION LAW., Apr. 1992, at 6, *passim*.

Under a grant from the A.B.A., I am currently supervising the undertaking of a multidisciplinary, international survey on dispute resolution in the construction industry.

<sup>3</sup> After years of working with issues in commercial dispute resolution (primarily addressing binding arbitration), involvement with a court-connected mediation program has acquainted me with a whole realm of scholarship and a network of organizations of which I previously had only marginal awareness—but which is clearly the "mainstream" of the alternative dispute resolution movement in the U.S. This apparent schism is as unfortunate as it is curious, since there is much to share between these spheres.

<sup>4</sup> See Linda Singer et al., *Alternative Dispute Resolution and the Poor—Part I: What ADR Processes Exist and Why Advocates Should Become Involved*, 26 CLEARINGHOUSE REV. 142, 143 (1992) (noting that "implementation of ADR efforts has been sporadic, depending in large part on individual interest and local initiative").

continues to unfold as it is written.<sup>5</sup> As history, my analysis lacks the perspective of distance. As a theoretical discourse, it bears telltale marks of the fray. (While most academic writing is to some degree inspired and informed by experience, or an apologia for prior belief or prejudice, the actor-cum-author wears his commitment on his sleeve.) As a global panorama of the practical, legal, ethical, and financial concerns of an evolving mediation program, it may prove too much—or too little—for the reader. Moreover, surveying the burgeoning literature on alternative dispute resolution (“ADR”) and the wealth of programs, private and public, that have developed throughout the country during the last two decades, one is tempted to conclude that there are no frontiers left to conquer.<sup>6</sup>

Yet much remains to be done, both conceptually and in the field, and much can be gained by sharing the lessons of experience. With the dramatic increase in interest (at once reflected and furthered by recent legislative and judicial reforms) in this mixed bag of “ADR,” there has never been a better time for experiment, coupled with reflection.<sup>7</sup>

One may question the value of in-process analysis of the evolution of one of the hundreds of local and regional “ADR” programs, public and private, now operating in the United States. The answer is three-fold. First, to inform and educate the bench and bar regarding the nature and relative advantages of one among a number of emerging alternatives to unassisted negotiation and litigation. Second, to add to the informed discourse—and the growing store of empirical findings—on *specific* dispute resolution processes in *specific* contexts.<sup>8</sup> Third, to describe and to encourage the kind of serendipitous coincidence of efforts and needs that change perception and reality in dispute

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<sup>5</sup> The author served on two task forces on alternatives to trial, incorporated the Mediation Center of Kentucky, served as the acting director during its first two months of existence, and remains chair of the organization's board. During the writing of this Article, policy decisions continued to be made and new projects initiated: among other things, changes in the circuit court rule, new domestic mediation screening procedures, a mediation training program for county high school students, a statewide construction mediation project, proposed health care reform legislation incorporating mediation procedures, and a statewide rule on court-connected mediation.

<sup>6</sup> Reading the recent ruminations of Carrie Menkel-Meadow, an early “conceptualizer” in the mainstream ADR movement, a comparatively recent entrant to the fray has the sense of having arrived too late for the party. For, as she observes, “[t]he bloom on the rose [of ADR] has faded as some experiments have been tried and now present their own problems or dilemmas.” Menkel-Meadow, *supra* note 1, at 39.

<sup>7</sup> As Professor Menkel-Meadow notes, further developments depend upon the development of worthwhile empirical data on specific processes. *Id.*

<sup>8</sup> Too often, paeans to the virtues of “ADR” and responding criticisms tend to group very different processes together for the purpose of praise or censure. Unless undertaken with care, such sweeping treatments may do no more than enhance the continuing confusion among attorneys and members of the general public.

As the author has previously observed, even generic processes such as binding arbitration or mediation comprehend a variety of discrete alternatives. See Thomas J. Stipanowich, *Of “Procedural Arbitrability”: The Effect of Noncompliance With Contract Claims Procedures*, 40 S.C. L. REV. 847 (1989). For the interested academic, for the professional counselor, and for contracting parties, that is the promise and the problem of evolving choices in dispute resolution.

resolution, and work toward the restoration of communication and community.

## I. ORIGINS OF A MEDIATION PROGRAM

### A. A Word on Context

#### 1. The Quiet Revolution

A quiet revolution is happening here and elsewhere.<sup>9</sup> We live in an era of proliferating alternatives and unprecedented examination of the processes by which disputes are adjudicated, settled, or avoided altogether.<sup>10</sup> Informal, out-of-court techniques have been employed to resolve patent disputes,<sup>11</sup> family controversies,<sup>12</sup> lemon law and warranty claims,<sup>13</sup> organizational conflicts,<sup>14</sup> building design and construction problems,<sup>15</sup> contests under the Freedom of Information Act,<sup>16</sup> mass torts actions,<sup>17</sup> intergovernmental disputes<sup>18</sup> and land use questions,<sup>19</sup> claims against brokerage firms,<sup>20</sup> and liability for hazardous waste cleanup.<sup>21</sup> Hundreds of corporations and law firms have solemnly

<sup>9</sup> See *infra* notes 10-31 and accompanying text.

<sup>10</sup> Of late, some are opting for prophylactic measures. For instance, the Corps of Engineers actively encourages its district representatives to "partner" with contractors to establish mutual goals and lines of communication—all in the hope of keeping job disputes to a minimum. See David Moffat, *Alternative Dispute Resolution: New Hope Emerges for Controlling Litigation in the Construction Industry*, ARCHITECTURE, June 1992, at 99, 100.

<sup>11</sup> See, e.g., James F. Davis, *Resolving Patent Disputes by Arbitration and Mediation*, 65 J. PAT. OFF. SOC'Y 275, 280-83 (1983) (describing and comparing arbitration and mediation and their application in the patent area); Thomas G. Field, Jr. & Michael Rose, *Prospects for ADR in Patent Disputes: An Empirical Assessment of Attorneys' Attitudes*, 32 IDEA 309, 318-20 (1992) (examining statistics showing an increased willingness to use ADR in patent disputes).

<sup>12</sup> See, e.g., Stephen K. Erickson, *A Cooperative vs. Competitive Approach to Conflict Resolution*, 6 AM. J. FAM. L. 173, 178 (1992).

<sup>13</sup> See, e.g., Jean Braucher, *An Informal Resolution Model of Consumer Product Warranty Law*, 1985 WIS. L. REV. 1405 (suggesting that an informal resolution process will encourage consumers to enforce product warranties).

<sup>14</sup> See, e.g., Barbara A. Gutek, *Disputes and Dispute-Processing in Organizations*, 12 STUD. L. POL. & SOC'Y ANN. 31 (1992).

<sup>15</sup> See, e.g., Moffat, *supra* note 10, at 99.

<sup>16</sup> See, e.g., Mark H. Grunewald, *Freedom of Information Act Dispute Resolution*, 40 ADMIN. L. REV. 1, 1-7 (1988) (analyzing the opportunity presented by dispute resolution processes to improve the administration and ensure the continued vitality of the public access system).

<sup>17</sup> See, e.g., Lucy V. Katz, *The L'Ambiance Plaza Mediation: A Case Study in Judicial Settlement of Mass Torts*, 5 OHIO ST. J. ON DISP. RESOL. 277 *passim* (1990).

<sup>18</sup> See, e.g., Roger Richman, *Formal Mediation in Intergovernmental Disputes: Municipal Annexation Negotiations in Virginia*, 45 PUB. ADMIN. REV. 510 (1985).

<sup>19</sup> See, e.g., T. Christian Miller, *Berkeley Council to Vote on Low-Income Housing*, S.F. CHRONICLE, Dec. 15, 1992, at A18.

<sup>20</sup> See, e.g., David C. Nelson, *The Arbitrability of Securities Disputes Between Brokers and Customers—Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 20 CREIGHTON L. REV. 1009 *passim* (1987) (analyzing the Supreme Court's decisions regarding the arbitrability of security claims).

<sup>21</sup> See, e.g., Scott A. Cassel, *Negotiating Better Superfund Settlements: Prospects and Protocols*,

pledged to seek alternatives to the courtroom; Xerox Corporation has renamed its Litigation Group the Dispute Resolution Group.<sup>22</sup> Community-based "ADR" projects have proliferated<sup>23</sup>; according to the National Center for State Courts, nearly 1,100 programs were being operated by state courts or assisting state tribunals in handling disputes in 1990.<sup>24</sup>

The quiet revolution is a worldwide phenomenon, from Canada<sup>25</sup> to the newly opened markets of Eastern Europe<sup>26</sup> and the Soviet Union<sup>27</sup> to the Far East.<sup>28</sup> More than ever, informal dispute resolution facilitates international trade and commerce.<sup>29</sup>

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16 PEPP. L. REV. 117 *passim* (1989) (advocating the use of ADR to increase voluntary cleanups at superfund sites); Bernd Holzmagel, *Negotiation and Mediation: The Newest Approach to Hazardous Waste Facility Siting*, 13 B.C. ENVTL. AFF. L. REV. 329, 330 (1986) (discussing "the role of mediation and negotiation of hazardous waste facility siting procedures").

<sup>22</sup> See *Building a Private Justice System*, BARRISTER, Fall 1986, at 25.

<sup>23</sup> See, e.g., Thomas Christian, *Community Dispute Resolution: First-Class Process or Second-Class Justice?*, 14 N.Y.U. REV. L. & SOC. CHANGE 771, 779 (1986) (concluding that "[m]ediation is a first-class process that provides first-class justice").

<sup>24</sup> David I. Tevelin, *The Future of Alternative Dispute Resolution*, FORUM, Winter 1992, at 15. Another study placed the number at more than 1,200. See STATE JUSTICE INSTITUTE AND AMERICAN JUDICATURE SOCIETY, PROCEEDINGS OF CONFERENCE ON THE FUTURE AND THE COURTS (May 1990).

<sup>25</sup> See, e.g., Charles W. Levesque, *Chapter 13 of the United States-Canada Free Trade Agreement: Has It Created an Open and Effective Government Procurement Dispute Resolution System?*, 12 NW. J. INT'L L. & BUS. 187, 187-89 (1991) (noting that the Procurement Review Board, established by Chapter 13, has created a procurement system that is effective, transparent, and equitable); Alan M. Rugman & Andrew Anderson, *The Dispute Settlement Mechanisms' Cases in the Canada-United States Free Trade Agreement: An Economic Evaluation*, 24 GEO. WASH. J. INT'L L. & ECON. 1, 1 (1990) (discussing the "dispute settlement mechanisms of chapters eighteen and nineteen of the Canada-U.S. Free Trade Agreement").

<sup>26</sup> See, e.g., Leonard Bierman, *The New Hungarian Labor Law: A Model for Modern Dispute Resolution*, 7 AM. U. J. INT'L L. & POL'Y 543, 556 (1992).

<sup>27</sup> See, e.g., John P. Feldman, Note, *Soviet Joint Ventures: Providing for Appropriate Dispute Resolution*, 23 CORNELL INT'L L.J. 107, 116-18 (1990) (suggesting the inclusion of arbitration clauses in joint venture agreements).

<sup>28</sup> See, e.g., Eric J. Glassman, *The Function of Mediation in China: Examining the Impact of Regulations Governing the People's Mediation Committees*, 10 UCLA PAC. BASIN L.J. 460, 461 (1992) (noting the Chinese government's support of the Republic's more than six million dispute mediators); Robert F. Utter, *Dispute Resolution in China*, 62 WASH. L. REV. 383, 396 (1987) (suggesting that the U.S. dispute resolution process could prosper if society were to adopt the Chinese view that preservation of a relationship is more important than achieving a "victory"); Michael K. Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 84 COLUM. L. REV. 923, 983 (1984) (noting that administrative guidance, a nonbinding Japanese administrative technique, "offers Western legal systems a promising model for regulation and resolution of certain kinds of disputes").

<sup>29</sup> See, e.g., Sharon D. Fitch, *Dispute Settlement Under the North American Free Trade Agreement: Will the Political, Cultural and Legal Differences Between the United States and Mexico Inhibit the Establishment of Fair Dispute Settlement Procedures?*, 22 CAL. W. INT'L L.J. 353, 355 (1992) (concluding "that the existing Canada-U.S. dispute resolution procedures can be successfully tailored to respond to the political, cultural and legal differences affecting Mexico and the U.S.");

Such an all-embracing phenomenon must have profound origins. As with other reformations, it bespeaks a desire to return to basics—in this case, simpler, more direct, more personal ways of handling problems—a goal that demands deliberate effort in a complex society where relationships tend to be more transitory.<sup>30</sup> Indeed, some scholars have likened the modern search for alternatives to litigation to methodologies employed in less complex cultures to solve problems.<sup>31</sup>

## 2. *Harbingers of Change in the Commonwealth*

The quiet revolution has come late to Kentucky. In the tradition-minded Commonwealth, old ways die hard.<sup>32</sup> Outside of Louisville, Kentucky's largest city, there have been relatively few of the overcrowded court dockets that spurred development of alternative processes in other regions.<sup>33</sup>

Not surprisingly, innovation has occurred primarily in Louisville and other major urban centers, such as Lexington and the northern Kentucky counties bordering Cincinnati.<sup>34</sup> Not long ago, Louisville boasted a

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Chun Gu, *The Applicable Law and Dispute Settlement in East-West Trade*, 46 U. TORONTO FAC. L. REV. 96, 99 (1988) (noting that disputes arising in east-west trade are resolved by negotiation, conciliation, or arbitration rather than through the court system); Jeanne N. Covington, Note, *Dispute Resolution Under Tax Treaties: Current and Proposed Methods*, 24 TEX. INT'L L.J. 367, 379 (1989) (noting the increased incidence of ADR in international tax disputes).

<sup>30</sup> Modern efforts at enhanced communication and community building must overcome certain long-observed aspects of the American character. Long ago, Alexis de Tocqueville warned that unless balanced by other habits, American individualism would lead to fragmentation and social isolation. His prediction appears to have come true. See M. SCOTT PECK, *THE DIFFERENT DRUM: COMMUNITY MAKING AND PEACE* 27 (1987). Judge Jack Etheridge, a contributor to this Symposium, has elsewhere described the current process as one of "devolution"—that is, "a return to modes of conflict management found in simpler and more traditional societies." Jack Etheridge, *Mending Fences: Mediation in the Community*, TRIAL, Oct. 1985, at 31, 31 (quoting Donald Black, *Jurocracy in America*, TOCQUEVILLE REV., Fall-Winter 1984, at 3, 7).

<sup>31</sup> See, e.g., Donald T. Weckstein, *The Purposes of Dispute Resolution: Comparative Concepts of Justice*, 26 AM. BUS. L.J. 605, 608-11 (1988) (noting the use of community aided dispute resolution in more primitive societies).

<sup>32</sup> Historically, what may have passed for "alternative dispute resolution" in the Commonwealth is reflected in the oath that all Kentucky attorneys take upon admission to the bar—in which the oath-taker swears, among other things, to refrain from dueling! See KY. CONST. § 228.

<sup>33</sup> Neighboring states such as Ohio and Indiana are much further along. See *infra* notes 43-44 and accompanying text. The slower progress of acceptance of ADR cannot be totally explained by the smaller population and rural character of Kentucky. Some rural states have considerable ADR activity. See generally Susan Keilitz et al., *State Adoption of Alternative Dispute Resolution: Where Is It Today?*, ST. CT. J., Spring 1988, reprinted in REPORT TO THE SUPREME COURT OF KENTUCKY BY THE CDR TASK FORCE ON COURT-ANNEXED DISPUTE RESOLUTION, app. A (1989) [hereinafter CDR TASK FORCE REPORT] (detailing the ADR movement's state-by-state progress).

<sup>34</sup> On the other hand, even rural litigation practices are beginning to change. Surveying the Commonwealth, a then-president of the Kentucky Bar Association noted that "[a]lternative dispute



nationally recognized, award-winning private enterprise, Commercial Dispute Resolution, Inc. ("CDR").<sup>35</sup> The organization, which offered private dispute resolution services, was affiliated with the Louisville Chamber of Commerce, supported by local and national financing, and provided guidance by influential advisers.<sup>36</sup> CDR may have been an idea before its time; the corporation eventually closed its doors due to lack of business. One outgrowth of CDR, however, was a dispute resolution task force that offered proposals for court-annexed mediation programs in Jefferson County and provided much of the initial groundwork for the later efforts that are the subject of this Article.<sup>37</sup> This year, court-sponsored mediation is at last becoming a reality in Jefferson County as one part of the circuit court's family court project.<sup>38</sup> Additionally, an independent, non-profit corporation, the Counsel on Peacemaking, is sponsoring mediation services for various kinds of cases.

In the northern Kentucky suburbs, local bar elements established the state's first court-annexed, nonbinding arbitration project in Boone County.<sup>39</sup> The program was recently expanded to encompass Kenton and Campbell Counties.

In Lexington and Fayette County, circuit court judges have routinely referred child custody cases to a mediation/evaluation procedure sponsored by the Department of Psychiatry at the University of Kentucky Medical Center.

In all of the urban centers, Dispute Mediation Programs were initiated in 1979 by local rule in the district courts, Kentucky's courts of limited jurisdiction, to handle misdemeanor matters on a voluntary basis.<sup>40</sup> The

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resolution through arbitration and mediation is much needed and is becoming a practical fact in every jurisdiction. Even in my practice in a rural area, it appears that I will arbitrate and mediate more cases this year than I will actually try." Letter from Thomas B. Russell to the author (August 31, 1991) (on file with author).

<sup>35</sup> The organization was the brainchild of Jay M. Tannon, a partner in the firm of Brown, Todd & Heyburn. In 1987, CDR received an award for innovation in the field of ADR from the Center for Public Resources, a New York-based organization formed by a consortium of Fortune 500 companies, national law firms, and others.

<sup>36</sup> See *Louisville Firms, Businesses Launch ADR Center*, 4 ALTERNATIVES 17, 17 (1986).

<sup>37</sup> See *infra* notes 130-63 and accompanying text. The result of the task force's work was a report to the Supreme Court of Kentucky. See CDR TASK FORCE REPORT, *supra* note 33.

<sup>38</sup> See Louise E. Graham, *Implementing Custody Mediation in Family Court: Some Comments on the Jefferson County Family Court Experience*, 81 KY. L.J. 1107 (1992-93).

<sup>39</sup> This project is described and analyzed in Christopher J. Mehling & Donald Stepner, *Court-Annexed Arbitration: The Northern Kentucky Experience*, 81 KY. L.J. 1155 (1992-93).

<sup>40</sup> In 1984, the Pretrial Services Office of the Administrative Office of the Courts evaluated the program and determined that approximately 85% of the people who resolved their disputes through mediation were satisfied. Telephone Interview with Melinda Wheeler, Field Manager Pretrial

program, operated by the Pretrial Services Division of Fayette County District Court, mediates cases five nights a week.

In addition to these public or quasi-public programs, there are assorted private programs stimulated by the automobile lemon law.<sup>41</sup> Also, various private providers of consensual dispute resolution services sought to make inroads in the Kentucky market. Until recently, however, none seriously challenged the hegemony of the American Arbitration Association ("AAA").

Thus, innovation in Kentucky has been the result of a few unrelated efforts by individuals or local organizations.<sup>42</sup> Kentucky lags behind neighboring states such as Ohio, which established a statewide office of dispute resolution to coordinate state and local programs,<sup>43</sup> and Indiana, which passed a universal rule authorizing courts to employ different dispute resolution mechanisms.<sup>44</sup>

### *B. A New Model*

#### *1. The Justice Center Task Force: A Coincidence of Purpose*

In June, 1991, Kentucky Supreme Court Chief Justice Robert Stephens announced the formation of a task force to establish a "justice center" in Fayette County that would serve as a model for out-of-court resolution of civil disputes in the Commonwealth.<sup>45</sup> The announcement formalized the efforts of a number of individuals who shared the goals of enhancing the civil justice system and changing the culture of dispute resolution.

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Services, Administrative (July 8, 1993).

<sup>41</sup> See Thomas J. Stipanowich, *Recent Developments in Commercial Arbitration*, KY. BENCH & BAR, Winter 1987-88, at 15, 53.

<sup>42</sup> Despite the establishment of a dispute resolution study committee by the state bar in 1988, no clearinghouse or referral service exists for such programs. Thus, the author and others involved in the subject project were unaware of the existence of the local district court mediation program until they read about it in a publication of the National Institute for Dispute Resolution.

<sup>43</sup> See *The Ohio Commission on Dispute Resolution & Conflict Management Annual Report*, May 1990-May 1991, at 2.

<sup>44</sup> See IND. CODE ANN. Rule ADR 1.4 (Burns 1993); *Bright Future for Dispute Resolution Says CI, RESOL.*, Winter 1993, at 1, 7; cf. IND. CODE ANN. Rule ADR 1.2 (Burns 1993) (listing the alternative dispute resolution methods available in Indiana).

<sup>45</sup> The task force consisted of leaders of the bench, bar and community, including a circuit court judge, a district court judge, the immediate past president of the Lexington Better Business Bureau (which had recently established a consumer mediation program), a professional mediator from northern Kentucky, an active journalist and social worker, the president of the Fayette County Bar Association, the chair of the Fayette County Bar's Young Lawyers' Section, the director of Central Kentucky Legal Services, a Legal Services staff attorney, the president of the local chamber of commerce, and a law student active in public advocacy programs. The task force was chaired by the author.

Although, as leading commentators have observed, various agendas tend to underlie programs of this nature,<sup>46</sup> the task force was united by a general singleness of purpose. While the desire to lighten local court dockets was an important consideration in the minds of judges,<sup>47</sup> the predominant focus of the task force group was on other goals: a greater voice for parties in the dispute resolution process, enhanced remedial options, access to justice for a broader segment of the population, and greater community involvement in the justice system.<sup>48</sup> To one circuit court judge, the program was another opportunity to bring new tools into play in the pre-trial process, and to strengthen the system's ability to deal with the diverse needs of users.<sup>49</sup> To another group leader, a social worker and community activist, the motive was to encourage peacemaking and inclusion of nonlawyers in the process. As an attorney, I shared these concerns. As an educator, my hope was to modify professional and community perceptions of the nature of the justice system and their respective roles.<sup>50</sup>

When informed of these broad goals, lawyers and nonlawyers alike invariably reacted favorably. As with balanced budgets and other abstract concepts of general appeal, however, the task force recognized the challenge of translating vague approval into active support for a concrete program.<sup>51</sup>

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<sup>46</sup> See Menkel-Meadow, *supra* note 1, at 6-7.

<sup>47</sup> In a letter of support for the Mediation Center, Chief Justice Stephens observed that "court dockets are greatly overcrowded, and judges are regularly faced with very controversial and complicated matters. The cost of litigating a matter has become, through no fault of the judicial system, slow and expensive. Mediation is one significant way to speed up the process of dispute resolution." Open Letter from Chief Justice Robert F. Stephens (February 28, 1992) (on file with author).

<sup>48</sup> See Menkel-Meadow, *supra* note 1, at 6-7.

<sup>49</sup> Judge James Keller previously spearheaded a program for education of divorced parents on the effect of divorce on children of the marriage. He also pioneered the use of mediation in divorce cases with the cooperation of Professor Lane Veltkamp and others at the University of Kentucky Medical School.

<sup>50</sup> Interestingly, the author's experience in the commercial and construction arena paralleled national trends. The construction industry, though for some reason not a focus of "mainstream" ADR scholarship and related funding, has long served as a laboratory for experimentation with dispute resolution processes. See, e.g., CENTER FOR PUBLIC RESOURCES LEGAL PROGRAM, PREVENTING AND RESOLVING CONSTRUCTION DISPUTES (1991); Stipanowich, *Rethinking American Arbitration*, *supra* note 2, at 425; Glower W. Jones & Thomas J. Stipanowich, *An Embarrassment of Riches: Alternative Dispute Resolution in the Construction Industry*, (South Carolina Symposium) (1987). In the last decade, the industry's emphasis on adjudication through binding arbitration has shifted to an exploration of many different processes aimed at enhancing the process of resolving disputes, or even avoiding disputes altogether. See *supra* note 10.

<sup>51</sup> Indeed, it was expected that as our program assumed tangible shape, there would be passive resistance, if not active opposition, by interests perceiving themselves as vested, particularly within the legal community. See Marguerite Millhauser, *The Unspoken Resistance to Alternative Dispute*

## 2. *Surveying the Territory*

The first challenge of the task force was to select from the various options available the model for out-of-court dispute resolution which best fit the community's needs. Although, based on preliminary research, *mediation* was the favored alternative, it was important to reaffirm this conclusion by group consensus. Once the basic course was charted, it was necessary to select one model from a number of different mediation models.

Despite the many emerging alternatives to traditional litigation or unassisted negotiation,<sup>52</sup> existing programs tend to fall into a few general categories, including binding arbitration, mini-trial, summary jury trial, nonbinding arbitration, neutral evaluation, and mediation.<sup>53</sup> While each of these processes has been used in resolving disputes within the Commonwealth, mediation was ultimately selected by the task force as the initial focus for a model program.<sup>54</sup>

*Binding arbitration*, long a favored procedure in the labor, construction, and commercial arenas, involves adjudication of disputes by private judges who are often chosen on the basis of their expertise in the field of controversy.<sup>55</sup> For many years, much of the work in the area of

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*Resolution*, 3 NEGOTIATION J. 29, 29 (1987) (noting that ADR is a subject "that receives almost universal endorsement in theory but substantially less in practice").

<sup>52</sup> Since the groundbreaking Pound Conference in 1976, at which Frank Sander expounded his concept of a "multi-door courthouse" comprising a smorgasbord of dispute resolution forums, see Frank Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976), there have been literally hundreds of published descriptions of the primary alternatives to judicial resolution of disputes. One concise, up-to-date summary of existing and emerging alternative programs and processes is contained in Singer et al., *supra* note 4, at 142; see also ABA STANDING COMMITTEE ON DISPUTE RESOLUTION, *ALTERNATIVE DISPUTE RESOLUTION: AN ADR PRIMER* (1987) (detailing basic guidelines for conducting ADR).

<sup>53</sup> Alternatives typically used in court-annexed programs are described in *ADR Program Designs: Some Guiding Principles*, 9 ALTERNATIVES 117, 119 (1991).

<sup>54</sup> Although many readers will find yet another comparative description of these procedures a maddening exercise, it is clear that many members of the bench, bar and community still confuse these procedures with one another. Despite the fact that our mediation center has been open for a year, it is still referred to by many as an "arbitration" program.

Local confusion may have been enhanced by the attempt to import a Michigan rule establishing a nonbinding arbitration program. The procedure was referred to as "mediation." See K. SHUART, *THE WAYNE COUNTY MEDIATION PROGRAM IN THE EASTERN DISTRICT OF MICHIGAN* (Federal Judicial Center 1984). When the rule was discussed at the Kentucky bar convention in 1991, knowledgeable critics, while supportive of the substance of the rule, pointed out this significant misnomer. They are not the only ones who have made this observation. See, e.g., Menkel-Meadow, *supra* note 1, at 35-36.

My obsessiveness about definitions is grounded in the concern that there is a real difference in these concepts. Mediators *do not* judge; arbitrators *do*. See *infra* text accompanying notes 72-74.

<sup>55</sup> See generally Stipanowich, *Rethinking American Arbitration*, *supra* note 2, at 433-53

binding arbitration has been conducted under the auspices of the AAA. While binding arbitration may offer certain advantages as a substitute for trial by judge or jury, it is still a form of adjudication—meaning that the issues between disputants, and the relief accorded, if any, are in the hands of a third party. In other words, it remains an adversary proceeding and therefore is not geared toward pre-hearing settlement of disputes, enhancement of communications between the parties, or the preservation of relationships.<sup>56</sup> Like trial, moreover, it is the culmination of a process that often involves extensive preparation by lawyers and parties; in some cases, it takes on many of the vestiges of complex litigation. Binding arbitration is fine as a secondary procedure in certain kinds of cases, but it should be, like litigation, a last resort.<sup>57</sup> In short, it is not a procedure around which to build a community-based dispute resolution program.<sup>58</sup>

*Mini-trial* is not trial in the ordinary sense, but an abbreviated proceeding that gives parties a foretaste of trial and, hopefully, some sense of the likely outcome. This predictive process, which exposes decision makers to a “best shot” presentation of each side of the case, is intended as a means of facilitating and objectifying settlement negotiations. These negotiations normally occur right after the “hearing.” A neutral third party adviser normally supervises the process, and may render a nonbinding decision or even assist with negotiations if the parties so desire. Mini-trial, which was the centerpiece of the ill-fated CDR program in Louisville,<sup>59</sup> has been successfully employed in the settlement of numerous commercial cases (including some very large ones).<sup>60</sup> It is, however, a somewhat formal process that can require

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(discussing perceived advantages and disadvantages of arbitration); IAN R. MACNEIL ET AL., *ARBITRATION: THE FEDERAL ARBITRATION ACT—LAW, POLICY, & PROCEDURE* (forthcoming Jan. 1994) (treatise co-authored by author).

<sup>56</sup> To the extent that arbitration may permit disputes to be resolved in a relatively private, informal setting, and conclude dispute resolution more speedily, it may achieve some of these goals in certain cases.

<sup>57</sup> Experience as an arbitrator, advocate, writer on arbitration, and empirical researcher has convinced the author that arbitration does offer relative benefits in many types of cases. It is clear, however, that arbitration is now heavily “colonized” by lawyers to an even greater extent than nonadjudicative processes such as mediation—with the result that arbitration practice can be a very complex process indeed. This may explain something of the revelation the author experienced in mediating and researching mediation.

<sup>58</sup> On the other hand, arbitration may be appropriate as a secondary or tertiary step (that is, after mediation or other conciliation-oriented processes) in an out-of-court dispute resolution process. On occasion, arbitration has been employed by parties under the auspices of the Mediation Center.

<sup>59</sup> See *supra* text accompanying notes 35-37.

<sup>60</sup> See, e.g., ABA SUB-COMMITTEE ON ALTERNATIVE MEANS OF DISPUTE RESOLUTION, *THE EFFECTIVENESS OF THE MINI-TRIAL IN RESOLVING COMPLEX COMMERCIAL DISPUTES: A SURVEY* (1986).

considerable preparation time,<sup>61</sup> and has not been widely employed in local programs such as ours.<sup>62</sup>

*Nonbinding arbitration*, which was the focus of many new court-sponsored programs in the 1970s and 1980s,<sup>63</sup> was also developed as a tool to spur settlement negotiations in court-bound cases. Like mini-trial, this model involves case presentations before a neutral or panel of neutrals. Although the resulting decision is not binding on the parties, applicable rules normally assess some amount (such as arbitrator costs and fees) against parties who thereafter seek trial and do not achieve a significantly better result.<sup>64</sup> Again, the ultimate goal is to predict outcome based on legal criteria, thus providing an "objective" basis for settlement.<sup>65</sup> The focus, however, is not on the negotiation process, but on exposing parties to the other side and to an outside view; moreover, the remedial options suggested by the process are somewhat limited. Such programs normally are limited to minor cases involving a monetary claim.<sup>66</sup>

*Neutral evaluation* processes are similar in many respects to the foregoing approaches.<sup>67</sup> Again, a major purpose is to afford attorneys an opportunity to test their case before a third party (often a judge or trial attorney), perhaps paving the way for settlement.<sup>68</sup> Used early in litigation, the process can

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<sup>61</sup> In a recent survey of construction attorneys analyzed at the University of Kentucky, one respondent stated that he found that preparation for mini-trial presentation required almost as much preparation as trial. Stipanowich & Henderson, *Beyond Arbitration*, *supra* note 2 (manuscript at 20, on file with author).

<sup>62</sup> *Summary jury trial* is similar in concept to the mini-trial, except that the condensed presentations are made before a jury which renders a nonbinding "advisory" verdict. The process, which is used by some federal and state court judges in Kentucky, is nearly always court-ordered and court-supervised. See William O. Bertelsman, *More on Summary Jury Trials*, KY. BENCH & BAR, Summer 1988, at 28; see also McKay v. Ashland Oil, 120 F.R.D. 43, 44-45 (E.D. Ky. 1988) (holding that courts can mandate summary jury trials). It is not a logical focus for an out-of-court program.

<sup>63</sup> See Keilitz et al., *supra* note 33, at app. A (surveying existing court-annexed arbitration programs, then the largest category of court-annexed ADR programs); see also Singer et al., *supra* note 4, at 144 (outlining various forms of ADR).

<sup>64</sup> See Mehling & Stepmar, *supra* note 39.

<sup>65</sup> See Craig A. McEwen, *Pursuing Problem-Solving or Predictive Settlement*, 19 FLA. ST. U. L. REV. 77, 78-80 (1991) (contrasting out-of-court techniques such as court-annexed arbitration, summary jury trial, and mini-trial, with mediation).

Just like other adjudicators, however, arbitrators in court-annexed programs do not always have a rational basis for their determinations. Unless their opinion is underpinned by a written opinion or other explanation, of course, one never knows.

<sup>66</sup> See *ADR Program Design*, *supra* note 53, at 119.

<sup>67</sup> See generally Wayne D. Brazil et al., *Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution*, 69 JUDICATURE 279 *passim* (1986) (discussing the use of neutral evaluation to develop issues and make the resolution of disputes more efficient). For a general discussion of other jurisdictions' experience with court-administered conciliation programs, such as neutral evaluation and voluntary mediation, see CDR TASK FORCE REPORT, *supra* note 33, at 3-10.

<sup>68</sup> There are lawyer "mediators" who see their role as a neutral factfinder, i.e., predicting the likelihood of liability and the probable amount of damages, if any. The Mediation Center of

avoid or abbreviate the discovery process and substantially reduce costs.<sup>69</sup> The process is sometimes used in conjunction with mediation, and may include an evaluator's report to the court in the event the case does not settle.<sup>70</sup>

### 3. *Why Mediation?*

Increasingly, federal, state and private programs are based on the use of *mediation*.<sup>71</sup> In contrast to other third-party processes, mediation places primary emphasis on negotiation and mutual accommodation, rather than adjudication.<sup>72</sup> In place of a quasi-judicial arbitrator or adviser, there is a mediator who facilitates negotiations in a variety of ways, but does not judge the case. In lieu of formal, trial-like presentations there are informal discussions concentrating on the interests of the parties rather than identified legal rights.<sup>73</sup> The goal is not so much to predict what will happen at trial as to deal flexibly with the real issues that parties bring to the table.<sup>74</sup>

Long used in the labor arena, mediation now is employed in a wide variety of contexts: United Nations efforts to resolve the ongoing crisis in the former Yugoslavia;<sup>75</sup> the siting of a dam on the Hudson River;<sup>76</sup> the management of an historic garden in New Jersey;<sup>77</sup> water regulation in

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Kentucky discourages this practice. See *infra* text accompanying notes 279-290.

<sup>69</sup> The evaluator may even propose the scope and schedule for discovery. See Brazil et al., *supra* note 67, at 282.

<sup>70</sup> See, e.g., CDR TASK FORCE REPORT, *supra* note 33, at 5, 8-9. The concept of communication to the court is highly controversial, however. See Brazil et al., *supra* note 67, at 282 (noting that evaluators must maintain confidentiality to encourage full and frank communication by parties, at least with respect to positions and valuation of case).

<sup>71</sup> See Singer et al., *supra* note 4, at 144. The history of mediation is detailed in NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY, PRACTICE* §§ 4.1-4.4 (1989).

<sup>72</sup> See Linda R. Singer, *Nonjudicial Dispute Resolution Mechanisms: The Effect on Justice for the Poor*, 13 CLEARINGHOUSE REV. 569, 570 (1979).

<sup>73</sup> See generally Note, *Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 HARV. L. REV. 1086, 1088 n.19 (1990) (discussing the focus of rights-based mediation).

<sup>74</sup> See McEwen, *supra* note 65 (contrasting out-of-court techniques such as court-annexed arbitration, summary jury trial, and mini-trial, with mediation).

<sup>75</sup> See *Bosnian Serb Leader Warns Against Imposition of New Sanctions*, UPI, Apr. 2, 1993, available in LEXIS, Nexis Library, Current File.

<sup>76</sup> See Singer et al., *supra* note 4, at 142; see also Lawrence Susskind & Connie Ozawa, *Mediated Negotiation in the Public Sector*, 27 AM. BEHAV. SCI. 255, 257-58 (1983) (discussing the use of mediation in the placement of a dam on the South Platte River). See generally Nancy Kubasek & Gary Silverman, *Environmental Mediation*, 26 AM. BUS. L.J. 533, 534 (1988) (examining increasing use of mediation in complex environmental disputes involving business, governmental and citizen interests).

<sup>77</sup> See Suzanne Poor, *Wrangle Over a Job Upsets a Garden's Serenity*, N.Y. TIMES, Aug. 30, 1992, at 13NJ (reporting township manager's efforts to mediate dispute over management of historic garden).

Hawaii;<sup>78</sup> agricultural loan disputes in middle America;<sup>79</sup> racial and ethnic confrontations in urban communities;<sup>80</sup> nursing home conflicts in Georgia;<sup>81</sup> small claims in Maine;<sup>82</sup> commercial and construction cases;<sup>83</sup> personal injury actions; disputes within nonprofit organizations;<sup>84</sup> small business disputes;<sup>85</sup> divorce<sup>86</sup> and child custody disputes;<sup>87</sup> sexual harassment<sup>88</sup> and rape cases;<sup>89</sup> problems between landlords and tenants;<sup>90</sup> playground conflicts;<sup>91</sup> and, in Beverly Hills, even dog barking cases.<sup>92</sup>

More and more, mediation programs are affiliated with state and federal court systems<sup>93</sup>—a fact reflected in the recent promulgation of a set of national standards for court-connected mediation programs by a blue-ribbon panel.<sup>94</sup> Although early programs were primarily of a voluntary nature, there is now a trend toward giving courts discretion to order parties to mediation, or to require mediation in certain classes of

<sup>78</sup> See Peter S. Adler, *Resolving Public Policy Conflicts Through Mediation: The Water Code Roundtable*, 1 AUSTRALIAN DISP. RESOL. J. 69, 69 (1990).

<sup>79</sup> See Donna L. Miller, Comment, *Avoiding Farm Foreclosure Through Mediation of Agricultural Loan Disputes: An Overview of State and Federal Legislation*, 1991 J. DISP. RESOL. 335, 339-44 (1991).

<sup>80</sup> See Singer et al., *supra* note 4, at 143.

<sup>81</sup> See M. Park et al., *Developing a Legal Services Program Policy on Alternative Dispute Resolution: Important Considerations for Older Clients and Clients with Disabilities*, 26 CLEARINGHOUSE REV. 635, 638 (Oct. 1992).

<sup>82</sup> See Craig A. McEwen & Richard J. Matman, *Small Claim Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237 (1987).

<sup>83</sup> See Stipanowich & Henderson, *Settling Construction Disputes*, *supra* note 2.

<sup>84</sup> See Kathryn D. Perkins, *Nonprofit Groups Using Innovation to Raise Cash*, SACRAMENTO BEE, Feb. 15, 1993, at A1.

<sup>85</sup> See Deborah Jacobs, *Keeping It Out of Court*, SMALL BUS. REP., June 1992, at 28, 33.

<sup>86</sup> See, e.g., Nancy A. Thoennes & Jessica Pearson, *Predicting Outcomes in Divorce Mediation: The Influence of People and Process*, 41 J. SOC. ISSUES 115 *passim* (1985).

<sup>87</sup> See Jessica Pearson & Nancy A. Thoennes, *Mediating and Litigating Custody Disputes: A Longitudinal Evaluation*, 17 FAMILY L.Q. 497, 497-98 (1984).

<sup>88</sup> See Edward J. Costello Jr., *The Mediation Alternative in Sex Harassment Cases*, ARB. J., Mar. 1992, at 16.

<sup>89</sup> See Deborah Goolsby, Note, *Using Mediation in Cases of Simple Rape*, 47 WASH. & LEE L. REV. 1183, 1199-1210 (1990).

<sup>90</sup> See Daniel Pearlman, *Alternative Dispute Resolutions, Mechanisms and Private Landlord-Tenant Matters*, 18 HOUSING L. BULL., Jan.-Feb. 1988, at 1, 6-8.

<sup>91</sup> See Jon Nalick, *Students Giving Peace a Chance*, L.A. TIMES, May 12, 1992, at B3.

<sup>92</sup> See *Bones of Contention Get Buried in Doggy Court Where Justice Is Tempered with Mercy*, PEOPLE, May 11, 1987, at 135.

<sup>93</sup> See, e.g., Albie M. Davis, *Community Mediation in Massachusetts: Lessons From a Decade of Development*, 69 JUDICATURE 307, 308-09 (1986) (examining district court mediation in Massachusetts).

<sup>94</sup> See CENTER FOR DISPUTE SETTLEMENT AND THE INSTITUTE OF JUDICIAL ADMINISTRATION, STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS (1992) [hereinafter MEDIATION STANDARDS].



cases prior to trial.<sup>95</sup> In some jurisdictions, regular trial activity is suspended while pending cases are mediated; nationwide, thousands of disputes have been resolved during these "settlement weeks."<sup>96</sup> These processes reflect the perception that mediation offers a number of distinct advantages in a system of civil justice.<sup>97</sup>

### *a. Potential Advantages of Mediation*

Those touting the advantages of ADR nearly always point out the relative efficiency of particular processes and the resources that may be saved by resolving disputes out of court.<sup>98</sup> Although mediation offers no guarantees of success (since resolution depends upon the agreement of the parties), it often shortens the life of a controversy and can eliminate the need for adjudication.<sup>99</sup> Thus, mediation may be a valuable alternative in cases where lawyer time is simply too expensive.<sup>100</sup> In addition to saving the parties time and money, mediation conserves court resources. This focus obscures the fact that the great majority of controversies never reach a lawyer, let alone the courthouse.<sup>101</sup>

More than any other procedure, mediation seeks to supplant the adversary mindset of pretrial and trial practice with a perspective of cooperation and mutual betterment. Instead of providing guideposts for settlement by approximating or predicting an adjudicated outcome, like court-annexed arbitration or mini-trial, mediation allows parties to candidly express, in a private setting,<sup>102</sup> the concerns that brought them to the table without filtering by attorneys.<sup>103</sup> The potential result is a collaborative exploration of all sorts of issues—not just those with legal labels<sup>104</sup>—and a solution that

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<sup>95</sup> See Singer et al., *supra* note 4, at 144.

<sup>96</sup> *ADR Program Design*, *supra* note 53, at 125.

<sup>97</sup> See generally Note, *supra* note 73, at 1090-95 (discussing the advantages of mandatory mediation and summary jury trial).

<sup>98</sup> See, e.g., Costello, *supra* note 88, at 20-21 (comparing mediation to litigation in sexual harassment situations).

<sup>99</sup> Early statistics from the Mediation Center support this general conclusion. See *infra* text accompanying notes 347-353.

<sup>100</sup> McEwen, *supra* note 65, at 85. For a discussion of the related problem of "case-dumping," see *infra* text accompanying notes 282-284.

<sup>101</sup> See David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 U.C.L.A. L. REV. 72, 83-84 (1983); see also Etheridge, *supra* note 30, at 31 (noting that empirical research indicates that "more than 90 percent [of the lawsuits filed] are settled without trial") (footnote omitted).

<sup>102</sup> See Costello, *supra* note 88, at 20.

<sup>103</sup> See J. Michael Keating & Margaret L. Shaw, "Compared to What?"—*Defining Terms in Court-Related ADR Programs*, NEGOTIATION J., July 1990, at 217, 218.

<sup>104</sup> As Judge Etheridge has explained, suits, countersuits, third party practice, and "the usual plethora of motions are almost always contrived—and not at the heart of the real dispute.

reaches beyond judicial remedies.<sup>105</sup> By involving the parties in the process, moreover, mediation makes it more likely that they will find the result acceptable.<sup>106</sup>

As Professor Fuller has stated, mediation may help parties resolve conflict "by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another."<sup>107</sup> Indeed, it is often said that mediation is most advantageous when the parties share an ongoing relationship and discussions take place within the "shadow of the future."<sup>108</sup> Thus, mediation can be a particularly valuable alternative for divorced parents, business partners, neighbors, and others who must continue to live or deal with one another.

Parties can shape their own destinies in mediation. Solutions are "limited only by the imagination and willingness of the parties, their counsel and the mediator."<sup>109</sup> As pointed out by Craig McEwen, who has made a career of empirical research and writing on mediation, the "atmosphere at times promotes original solutions to problems, identifies and deals with issues that attorneys had not thought important, and achieves settlement where they thought it impossible."<sup>110</sup> The result might even be an agreement to resolve current or future issues by mediation or by other means.<sup>111</sup>

Even where there is no immediate agreement, mediation may have benefits. The process may offer parties the first opportunity to express their point of view in the presence of others and be heard by the other party—the cathartic equivalent of a day in court. Likewise, by exposing parties to other points of view, mediation may serve as an "eye opener"—perhaps reinforcing prior advice from counsel.<sup>112</sup> Mediation

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Mediation, skillfully handled, avoids masking the real issues." Etheridge, *supra* note 30, at 33.

<sup>105</sup> The author observed one mediation in which the parties were a male medical professional and a female employee who he had fired. Although the employee had sued the dentist for allegedly withholding salary and bonuses, it became apparent in confidential discussions between the employee and the mediator that there was another issue—the former employer's unwelcome sexual advances. Although she and her attorney had elected not to seek compensation for sexual harassment, she wanted an apology.

<sup>106</sup> See McEwen & Mauman, *supra* note 82, at 238-39.

<sup>107</sup> Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971).

<sup>108</sup> See, e.g., Park et al., *supra* note 81, at 638.

<sup>109</sup> Costello, *supra* note 88, at 21 (reporting one instance where a subject of harassment agreed to a written, confidential apology from the offending executive, company's promise to hold training sessions on the issue of harassment, and payment of victim's attorney fees).

<sup>110</sup> McEwen, *supra* note 65, at 86.

<sup>111</sup> See *infra* part VII.F. (describing agreements mediated at the Mediation Center of Kentucky, Inc.).

<sup>112</sup> See James J. Alfin, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good*

may help to overcome lack of trust and animosity, and establish channels of communication.<sup>113</sup> For these reasons, issues often are resolved within days or weeks after mediation. Mediators may also refer parties to other sources of aid or information.

Attorneys may also benefit from a firsthand view of an adversary's case. Mediation may be the event that forces counsel and client to begin thinking seriously about settlement goals and needs.<sup>114</sup>

Due to its simplicity and informality, mediation may take place in a variety of settings and is therefore adaptable to a wide range of civil disputes. In the judicial context these include small claims, divorce, and the general run of civil cases. Some programs even employ the process to address minor criminal behavior.

An example from the author's experience illustrates some of the potential benefits of mediation. The subject was a dispute involving a contract for the purchase and sale of a Thoroughbred. When the animal died shortly after the transaction was completed, the buyer brought an action for breach of warranty. The parties agreed to arbitrate the dispute in accordance with the terms of the contract; the author was appointed as arbitrator. Prior to commencing the arbitration hearing, the attorneys were asked whether or not they had taken the opportunity to explore the possibilities of settlement. They had not, but after conferring with their clients, counsel decided that it might be profitable for the parties to discuss their differences prior to commencing arbitration. The hearing was postponed while the parties met in private. After two hours, the attorneys reported that some progress had been made, but that there were several unresolved points of conflict in the discussion. At this juncture, the author inquired whether or not it would be appropriate to engage in mediated discussions.<sup>115</sup> After consulting with their attorneys, both parties agreed. In an intense, three-hour, mediated negotiation session (without private caucuses between the mediator and individual parties), it emerged that although the subject of arbitration was to have been the issue of liability, there was no real dispute on that issue. Instead, the seller's concern was

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*Mediation*?", 19 FLA. ST. U. L. REV. 47, 62-63 (1991).

<sup>113</sup> See Roger J. Patterson, *Dispute Resolution in a World of Alternatives*, 37 CATH. U. L. REV. 591, 602-03 (1988).

<sup>114</sup> See McEwen, *supra* note 65, at 78-80.

<sup>115</sup> It was explained that, by serving as mediator, the author would prejudice his role as arbitrator since he would inevitably be exposed to party confidences, possibly including settlement strategies and proposed offers of settlement. On the other hand, if mediating parties are informed of these inherent problems and still favor empowering a single individual to perform dual roles, they should be able to do so. The author recently performed the roles of mediator and arbitrator in one case where both parties were represented by sophisticated attorneys who jointly requested the procedure.

his ability to compensate the buyer for his injuries. Once this point was resolved, the problem became one of finding substitutes for an immediate cash settlement, which was out of the question. In a detailed agreement, the seller satisfied the obligation by transferring two other horses and interests in others, including several seasons. The parties, who had begun the day scarcely speaking, conversed amicably as the session ended. There were indications that their commercial relationship might be restored. Had the case been arbitrated that day and an award rendered for the buyer on the liability question, the real issue—means of payment—would not have been addressed. Through mediation, that issue was brought to the fore and resolved, and the good will that previously existed between the parties was partially restored.

### *b. Potential Concerns*

Those with experience with the mediation process understand that mediation is not always a constructive or appropriate option. One frequently voiced concern is that mediation may be an instrument of oppression where there is a gross imbalance in bargaining power between the parties.<sup>116</sup> The disparity may be financial, informational, or psychological. Sometimes the problem is evident, and sometimes it is not. The appropriate response depends upon the situation. For example, a party's physical impairment need not prevent mediation as long as those special needs are somehow served.<sup>117</sup> Information regarding legal rights and remedies might be provided by a capable counselor if resources permit.<sup>118</sup> On the other hand, there are situations where a party is incompetent to negotiate, either generally or in a specific situation, or the imbalance between the parties is so great that mediation simply cannot produce an acceptable result.<sup>119</sup> For this reason, some early mediation

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<sup>116</sup> See Note, *supra* note 73, at 1100; see also Laura Nader, *Trading Justice for Harmony*, FORUM, Winter 1992, at 12, 12 ("[T]he legal problems that need creative new forms of administration of justice are those between people of unequal power."); Singer, *supra* note 72, at 575 ("It is generally agreed that mediation between parties of significantly unequal power is inappropriate.").

<sup>117</sup> See, e.g., Park et al., *supra* note 81, at 641.

<sup>118</sup> Occasionally, attorneys use mediation as a means of handling a case that is viewed as unprofitable. See McEwen, *supra* note 65, at 85. Although successful mediation may benefit a client in such circumstances, retained attorneys should never view the procedure as a substitute for adequate client counseling.

<sup>119</sup> See Linda R. Singer et al., *Alternative Dispute Resolution and the Poor—Part II: Dealing with Problems in Using ADR and Choosing a Process*, 26 CLEARINGHOUSE REV. 288, 290 (1992); see also MEDIATION STANDARDS, *supra* note 94, § 4.2(c) (providing that a party's inability to negotiate effectively may militate against court referral); Nader, *supra* note 116, at 12-13 (observing that "[t]he assumption that change in the delivery of justice is to be achieved by adding mediators or arbitrators

projects excluded consumer complaints involving large corporations.<sup>120</sup> Many believe that mediation is also unsuitable in domestic cases where the relationship is marked by physical abuse or violence.<sup>121</sup>

Another limitation of mediation is its use in controversies involving numerous interests, including questions of broad public policy.<sup>122</sup> Where not all interested parties can be adequately represented in the process, the mediated result may be open to question.<sup>123</sup> On the other hand, as some observers of environmental policy making have observed, mediated negotiations that attempt to incorporate the voices of affected groups in the rulemaking process ("neg-reg") may be an improvement over traditional ways of developing regulations.<sup>124</sup>

As with any dispute resolution process, there is the potential for abuse.<sup>125</sup> Parties and attorneys may show up at the table with nothing in mind but delaying a final resolution of the issues,<sup>126</sup> perhaps in hopes of wearing down or intimidating the opposition. Although there is no way to avoid these situations completely, it is clear that sometimes even the most cynical of parties, once in the process, may be persuaded to deal in good faith.<sup>127</sup>

A related problem has to do with the use of mediation for discovery purposes. To the extent that this is a valid concern, however, there are means of addressing the issue, including effective use of caucuses

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illustrates a blindness to the importance of social and cultural structures that produce legal problems").

<sup>120</sup> See Singer, *supra* note 72, at 570.

<sup>121</sup> See, e.g., Park et al., *supra* note 81, at 640.

<sup>122</sup> See MEDIATION STANDARDS, *supra* note 94, § 4.2(b) (recognizing that where repetitive violations of statutes or regulations need to be dealt with collectively and uniformly, this may militate against court referral to mediation).

<sup>123</sup> See Robert Coulson, *Justice, Court Reform, and Privacy*, FORUM, Winter 1992, at 10, 11 ("Since private ADR procedures take place in private, one may suspect that vaunted win/win resolutions may occur at the expense of absent interests."); Kubasek & Silverman, *supra* note 76, at 548 (acknowledging that one concern with environmental mediation is the potential for overlooked interests).

<sup>124</sup> See Kubasek & Silverman, *supra* note 76, at 545 (suggesting that a facilitated meeting of minds prior to rulemaking may produce better results than the current system). "Neg-reg" stands for negotiated regulation. See generally *Army Engineers Dig More Deeply into ADR: Finish Two Mini-Trials and Oil "Neg-Regs,"* 5 ALTERNATIVES 83, 88 (1987) (explaining the significance of neg-regs in an increasing number of agencies' rulemaking procedure).

<sup>125</sup> See Paul Fisher, *Tips to Attorneys and Mediators: How to Successfully Mediate a Case*, ARB. J., Sept. 1991, at 59, 60.

<sup>126</sup> See Alfin, *supra* note 112, at 63 (noting the concern of some Florida mediators and attorneys that parties just show up and "go through the motions").

<sup>127</sup> One Center mediator has proposed a screening process in which the mediator or intake person interviews the parties or their attorneys to determine their agendas. Of course, parties do sometimes change their minds during mediation.

between the mediator and individual parties to facilitate confidential sharing of information.<sup>128</sup>

Finally, no system of "consensual justice" can displace the court system. It is clear that some rights must be declared or vindicated by public tribunals. Coercion, punishment, and deterrence also remain largely the realm of the public forum.<sup>129</sup> The courts continue to be a necessary primary source of legal norms and societal standards.

A helpful way of looking at the possibilities and limitations of mediated dispute resolution is to focus on its consensual aims. The concerns are similar to those confronted in the larger realm of private contract. Is it possible or permissible for the parties to resolve the particular issue by private agreement? Are the parties capable of arriving at a fair agreement in these circumstances? Since financial, experiential, and other inequalities are inherent in most contractual relations, the question must be one of drawing lines. The standards and limits established by courts in addressing these questions in discrete situations may set a floor for what is permissible in mediation. These conclusions may not always be determinative, however, for the mediator who participates in and facilitates the bargaining process.<sup>130</sup>

#### 4. *What Kind of Mediation Program?*

##### a. *CDR Task Force Recommendations*

In electing to develop a mediation program, the Justice Center Task Force built upon the earlier work of the CDR Task Force on Court-Annexed Dispute Resolution. In 1989, the CDR group concluded a year of research into alternatives for court-based dispute resolution in Jefferson

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<sup>128</sup> See *infra* text accompanying notes 306-307.

<sup>129</sup> See *MEDIATION STANDARDS*, *supra* note 94, § 4.2(a) (recognizing that where there is a need for public sanctioning of conduct, this may militate against court referral to mediation). There is, however, a trend toward permitting private judges-arbitrators to make awards of punitive damages. See generally Thomas J. Stipanowich, *Punitive Damages in Arbitration: Garrity v. Lyle Stuart, Inc. Reconsidered*, 66 B.U. L. REV. 953, 963-70 (1986) (discussing courts' growing readiness to compel arbitration of punitive damage claims).

<sup>130</sup> One commentator has proposed a four-prong test for "mediability":

1. Is the issue capable of being resolved by changing perceptions, attitudes, or behavior?
2. Is there relative parity of power?
3. Is there need for punishment, deterrence, or redress?
4. Are the parties capable of entering into an agreement, and carrying it out?

Laurie Woods, *Mediation: A Backlash to Women's Progress on Family Law Issues*, 19 CLEARINGHOUSE REV. 431, 435 (1985); see also LINDA R. SINGER, *SETTLING DISPUTES: CONFLICT RESOLUTION IN BUSINESS, FAMILIES, AND THE LEGAL SYSTEM* 177 (1990) (listing several relevant factors in determining whether ADR is appropriate).

County, Kentucky, which includes Louisville.<sup>131</sup> The task force, which consisted of judges, lawyers, businesspersons, public officials, and academicians, did extensive research into other state and local programs and heard presentations by some of the leading figures in the field of alternative dispute resolution.<sup>132</sup> At some point, it was decided to concentrate the efforts of task force members on certain specific kinds of programs. A subcommittee chaired by the author investigated the use of mediation in small claims programs. Special attention was given to programs in Maine and the District of Columbia Superior Court. Both programs had attained high measures of settlement and served as models for programs in other jurisdictions. According to a much-cited study by Professors McEwen and Maiman, approximately three quarters of the small claims submitted to mediation in the county courts of Maine were settled. The settlement rate was slightly higher in cases in which the parties voluntarily chose mediation and slightly lower in court-mandated mediation.<sup>133</sup> The D.C. court program boasted similar statistics: in the first twenty months of operation, approximately sixty-six percent of the 3,800 disputes submitted to mediation were settled.

McEwen and Maiman's groundbreaking study also found that mediated resolution offered other advantages beside high rates of settlement for small-claims. They concluded that the process offered more flexibility in problem solving and increased commitment to the resolution.<sup>134</sup>

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<sup>131</sup> See CDR TASK FORCE REPORT, *supra* note 33, at 3-10.

<sup>132</sup> These included the Honorable Herman Lum, Chief Justice of the Supreme Court of Hawaii; Jonathan B. Marks, President of Endispute, Inc.; Deborah R. Hensler, Senior Social Scientist at the Institute for Civil Justice of the Rand Corporation; William R. Drake, Vice President of the National Institute for Dispute Resolution (NIDR); Michael Lewis, Senior Adviser to the National Institute for Dispute Resolution; Susan Keilitz, Staff Attorney for the National Center for State Courts; Geoff Gallis, Director of Research and Special Services for the National Center for State Courts; Roger Hanson, Visiting Scholar at the National Center for State Courts; and JoAnn Pozzo, Director of the District of Columbia Multi-Door Courthouse Program.

<sup>133</sup> See CDR TASK FORCE REPORT, *supra* note 33, at 11-12 (citing Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 L. & Soc'y REV. 11, 35 (1984)).

<sup>134</sup> As summarized in the CDR TASK FORCE REPORT, McEwen and Maiman's study found:

1. Because the [mediating] parties can participate in shaping the resolution of their dispute, they can avoid "all or nothing" solutions which litigation often produces. Hence, the parties are significantly more likely to be satisfied with the settlement and more likely to live up to promises made in the context of settlement.
2. Mediators often highlight points of agreement, define issues and summarize positions, thus providing a kind of "reality testing" that may be unavailable in unaided negotiation. By proposing possible settlements, mediators may also relieve the parties of the psychological burden of initiating concessions. Mediators can also encourage parties to think about the relative costs and advantages of various courses of action.

On the strength of this and other evidence, the CDR Task Force recommended that a court-annexed mediation program be established in Jefferson District Court. Although the program was to be voluntary,<sup>135</sup> it was similar in some respects to that eventually developed for the Mediation Center of Kentucky. The core of the program was to be staffed by a cadre of volunteer mediators<sup>136</sup> with formal training.<sup>137</sup> Administration was to be provided by a court-employed program coordinator, who would also handle other ADR programs (such as divorce mediation).<sup>138</sup>

The CDR Task Force also endorsed the work of the Louisville Bar Association's ADR Task Force on Domestic Mediation, which proposed the development of a court-sponsored mediation program for child custody and visitation issues.<sup>139</sup> The proposal called for mandatory

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3. The mediator's participation in negotiations makes consensual commitment semi-public. Having a mediator witness the agreement may increase the parties' sense of commitment to the settlement.

4. Whether the process is mandatory or voluntary does not strongly influence the parties' attitudes toward mediation.

5. Mediated settlements are more likely to make arrangements for installment payments or immediate payments than adjudicated judgments.

6. Mediation is most likely to be successful if tied to the threat of formal adjudication.

CDR TASK FORCE REPORT, *supra* note 33, at 12-13 (citing McEwen & Mairman, *supra* note 133, at 249-68).

<sup>135</sup> Parties to small claims actions were to be informed of the alternative of mediating disputes at the time of filing, and again immediately prior to trial by the presiding judge. The filing of a complaint was not to be a prerequisite to eligibility for the mediation process. *See id.* at 13.

<sup>136</sup> The proposal called for recruitment of 20 to 40 volunteers from the ranks of the bar, although panel members could be drawn from other sources if there were not enough interested attorneys. *Id.* at 14. Mediators with legal background were preferred by the Task Force (which consisted primarily of attorneys) for the reason that it was believed that their familiarity with applicable rules of law would help the parties understand the strengths and weaknesses of their case. *Id.* The group hoped that bar organizations would consider special awards or commendations for the mediators' pro bono efforts. *Id.* at 15.

The issues of mediator qualifications and training would be revisited and rethought by the Justice Center Task Force.

<sup>137</sup> Prior to serving as a mediator, each panelist was to "undergo one or two days of intensive training in mediation, including simulations, and observe at least one evening of mediation." CDR TASK FORCE REPORT, *supra* note 33, at 15. The group proposed that CLE credit be given attorneys taking mediation training. *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> The Preamble to the ADR Committee's Proposal stated:

It is recognized that the present process for the resolution of custody disputes between parties to a divorce action has substantial potential for serious emotional harm to the children involved and is often a process without resolution. There are recognized and successful alternatives to the process of litigation in resolving custody disputes. The process of court-ordered or court-sanctioned mediation has been established as one such alternative.

*Id.* app. G.



mediation of all such cases, except where the court granted a motion waiving the process. Mediation was to be conducted by a court-employed trained professional unless the parties elected to retain another mediator at their own expense.

*b. Field Visits to Other Models of Mediation*

Research compiled by the CDR Task Force provided the basis for a compelling argument for the use of mediation in certain classes of cases. As the Justice Center Task Force continued its investigation, it became apparent that numerous types of mediation programs existed throughout the country.<sup>140</sup> The Task Force resolved to take a firsthand look at several different programs.

The first program visited by members of the task force was the Private Complaint Program operated by the Cincinnati City Prosecutor's Office. The program mediates disputes between private citizens involving minor criminal conduct<sup>141</sup> on referral from the police, the courts, and by private complainants or their attorneys.<sup>142</sup> This well-managed office uses the services of a number of paid mediators, usually graduate or professional students, to perform case intake and mediation. Many of the mediated cases involve allegations of domestic violence—a fact reflected in the physical lay-out of the office.<sup>143</sup>

A very different model is represented by the Center for Mediation of Disputes, also in Cincinnati, a bar-sponsored project that began as a court-

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<sup>140</sup> These had proliferated since the late 1970s, when, with considerable encouragement from Griffin Bell's Justice Department and federal funding through the LEAA, three regional "neighborhood justice centers" were established. Singer, *supra* note 72, at 570. The Atlanta Center, which was based on a mediation model, proved to be by far the most successful. See Griffin Bell, *Improving the Administration of Justice*, FORUM, Winter 1992, at 5, 6. Today there are more than 350 community justice centers in operation. Singer et al., *supra* note 4, at 143; see, e.g., Davis, *supra* note 93, at 308 (surveying growth of community mediation in Massachusetts).

<sup>141</sup> The program is similar conceptually to New York's Community Dispute Resolution Centers Program, which is discussed in this volume by its Director, Thomas F. Christian. See Thomas F. Christian, *Running Statewide Dispute Resolution Programs: The New York Experience*, 81 KY. L.J. 1093 (1992-93).

<sup>142</sup> Although participation in the mediation program is theoretically voluntary, defendants are notified of the scheduled "hearing" by a form from the prosecutor's office. This tends to "encourage" attendance. The program also handles bad check cases. Interview with Debra Redlich, Mediation Services Specialist, Private Complaint Program, in Cincinnati, Oh. (Aug. 23, 1991). The close relationship between the program and the prosecutor's office, and the physical location of the private complaint program was a matter of concern to some task force members, who viewed certain features of the process as potentially coercive of settlement.

<sup>143</sup> There are a number of security precautions. Intake personnel work behind heavy glass partitions; meeting rooms are separated from the lobby by a locked door and screening device. Each room is equipped with an emergency button to summon police if necessary. *Id.*

annexed program in 1988.<sup>144</sup> For its first three years of operation, a temporary local court rule provided for mandatory mediation (that is, at the judge's discretion) of all civil disputes not subject to the court-annexed arbitration program in common pleas—in other words, most cases over \$25,000. The caseload consisted primarily of divorce, employment issues, business disputes, and insurance cases, along with a smaller number of voluntarily mediated zoning and public policy matters.<sup>145</sup> When the pilot period ended, mediation at the Center became purely voluntary; at that time, the Center anticipated a drop in the caseload of approximately fifty percent.<sup>146</sup> The Center relies on a small cadre of trained professional mediators, including psychologists, attorneys, and a public policy specialist. Mediators are part-time, and operate on a fee basis, except for the salaried director, who spends sixty percent of his time in mediation and the rest on administrative and public relations matters.<sup>147</sup>

The Justice Center of Atlanta ("JCA"), formerly the Neighborhood Justice Center of Atlanta, is a nonprofit program for mediation of disputes of many kinds. Nearly all of the more than 200 mediators on its panel are volunteers, and all cases are handled by the program at no cost to the parties.<sup>148</sup> Founded in 1976 with federal funds, the program enlisted the support of local county governments and various private institutions in order to survive and grow to its present size. Today, ninety-five percent of the JCA's cases are referred from the courts of Fulton and DeKalb Counties, whose judges have discretion to mandate mediation in contested custody and visitation matters as well as other civil cases.<sup>149</sup> All cases in the magistrate's court (claims involving less than \$5,000) are automatically referred to the JCA. Of almost 34,000 mediations held at the Center in its first thirteen years of operation, approximately forty-five percent were settled in mediation.<sup>150</sup> Today, thanks in large part to the perseverance of its first director, Edith Primm, the JCA is a national model of community dispute resolution.<sup>151</sup>

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<sup>144</sup> This program has been renamed the Center for Resolution of Disputes.

<sup>145</sup> Director Lawson observed that it was difficult to get multiple parties together on a voluntary basis. Interview with Jerry Lawson, Director, Center for Mediation of Disputes, in Cincinnati, Oh. (Aug. 23, 1991).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> Interview with Edith B. Primm, Director of Research and Development, Justice Center of Atlanta, in Atlanta, Ga. (Sept. 5, 1991). Edith Primm discusses the JCA in greater detail elsewhere in the Symposium. See Edith B. Primm, *The Neighborhood Justice Center Movement*, 81 Ky. L.J. 1067 (1992-93).

<sup>149</sup> See *id.*

<sup>150</sup> Justice Center of Atlanta, Data Chart (July 1991) (compiling JCA data from January 1978 through July 1991) (on file with author).

<sup>151</sup> The JCA won kudos for settlement of Jan Kemp's nationally publicized action against the

The Justice Center Task Force was also availed of extensive advice by national experts such as Susan Keilitz of the National Center for State Courts<sup>152</sup> and Sharon Press, Director of the Florida Dispute Resolution Program, a sophisticated statewide network of court-connected mediation programs.<sup>153</sup> The Florida system consists of three distinct mediation projects—county court,<sup>154</sup> family court,<sup>155</sup> and general civil.<sup>156</sup> Each system has discrete experiential, training, and compensation requirements.<sup>157</sup>

Exploring different models yielded considerable information on all aspects of our problem, from program design to mediator training to ethical standards. By far the most useful approach involved direct contact with professionals in the field, nearly all of whom were very glad to share their experiences and perceptions.

### *C. The Mediation Center of Kentucky, Inc.*

The endpoint of the task force's effort was the incorporation of the Mediation Center of Kentucky, Inc., a nonprofit quasi-public institution offering the services of trained volunteer mediators to assist parties in settling a myriad of disputes. The concept borrowed features from several different programs, although the dominant models were the Justice Center of Atlanta and the Florida mediation programs.

The choice of an all-volunteer mediation program was made after an extensive discussion of the alternatives. The group concluded that such a program entailed a number of distinct advantages.

First, such a program would minimize the cost of dispute resolution services, encouraging their use by a broad segment of the population. This would have the additional benefit of providing assistance to segments of the population not able to afford the cost of extensive lawyer representation in the courts,<sup>158</sup> and of addressing those controversies involving relatively small

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University of Georgia, see Hank Ezell, *Kemp Case Mediation Puts Justice Center in Public Eye*, ATLANTA CONST., May 7, 1986, at C1, and the long-simmering Presidential Parkway dispute in Atlanta, see David Beasley, *City's Scars Can Begin to Heal Thanks to Parkway Compromise*, ATLANTA CONST., Aug. 29, 1991, at A1.

<sup>152</sup> See Keilitz et. al., *supra* note 33.

<sup>153</sup> Sharon Press is also participating in this Symposium. See Sharon B. Press, *Building and Maintaining a Statewide Mediation Program: A View from the Field*, 81 KY. L.J. 1029 (1992-93).

<sup>154</sup> FLORIDA DISPUTE RESOLUTION CENTER, FLORIDA MEDIATION/ARBITRATION PROGRAMS: A COMPENDIUM 2-1 (1992).

<sup>155</sup> *Id.* at 4-1.

<sup>156</sup> *Id.* at 5-1.

<sup>157</sup> *Id.* at 2-1 (county court mediation), 4-1 to 4-2 (family mediation), 5-1 to 5-2 (general civil mediation).

<sup>158</sup> This was particularly important in light of the anticipated close connection between the

dollar amounts that cannot efficiently be tried in court (not to mention the vast number that, for one reason or another, do not belong in court). Low costs would also minimize one category of concerns regarding court-mandated mediation, thus enhancing the possibility that courts would make full use of the alternative in civil cases and expose more parties and attorneys to the benefits of the process.

Second, a broad-based volunteer mediation project would have the effect of "opening up" the justice system in several ways. It would stimulate community service participation by members of the bar and other qualified members of community as mediators and intake workers. It would encourage parties to step back into the process of resolving their own problems. Over time, it would educate the bench and bar, and the larger community, regarding the possibilities of a flexible, practical, non-adversarial alternative.

At the time of the creation of the Mediation Center, there were very few professional mediators in the Bluegrass region. On the other hand, the volunteer spirit was alive and well, and it was hoped that there would be no shortage of qualified would-be mediators.

The task force favored a comprehensive mediation program addressing as many kinds of disputes as possible. The Center would handle general civil actions, including small claims, and divorce and child custody disputes.<sup>159</sup> Felonies and misdemeanors were regarded as generally inappropriate for mediation.<sup>160</sup> Although the Center anticipated a large volume of court-referred cases, referrals from other agencies and from private individuals would also be sought.<sup>161</sup>

The decision to incorporate as a nonprofit, quasi-public dispute resolution center separate from (but maintaining close ties to) the justice system was based upon the goal of presenting an image of neutrality and of independence from other institutions and interests. It also was intended to present an orientation toward the whole community, rather than simply the courts or the legal profession. Finally, it was believed that this form would permit the maximum creativity in meeting the many and varied

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program and the local courts. A national panel recently concluded that "[a]ccess to court-connected mediation services should be provided as broadly as possible. Specifically, courts should not make mediation available based on whether the parties are able to pay" MEDIATION STANDARDS, *supra* note 94, § 1.1.

<sup>159</sup> From the beginning, general civil disputes, divorce, and small claims were viewed by the group as discrete categories requiring distinctive procedures and mediator training requirements.

<sup>160</sup> Moreover, minor misdemeanors were already being addressed by the night mediation program at District Court. There were also concerns regarding security and liability issues.

<sup>161</sup> Disputes from within the educational system (such as disciplinary matters and the concerns of students with disabilities), landlord/tenant disputes, and zoning matters were among the categories of disputes viewed as particularly appropriate for mediation.

needs of the community, and serving as a model and resource for the entire Commonwealth of Kentucky.<sup>162</sup>

## II. COURT REFERRAL RULES AND PROCEDURES

### A. Court-Mandated Mediation

Contemporaneous with the incorporation of the Mediation Center of Kentucky, a move was made to amend local circuit court rules to specifically authorize judges to order parties to mediate disputes. Court referrals were an important—in some views, critical—component of successful programs in Atlanta and the state of Florida. Although a number of states have passed legislation or enacted rules of court giving courts discretion to order mediation or other processes prior to trial,<sup>163</sup> no such rule existed in Kentucky.

It was believed that required participation in the program would be the only effective way to introduce a significant sector of the bar and community to mediation.<sup>164</sup> Although the consensus among supporters of the rule was that the judges already had inherent power to order parties to mediation,<sup>165</sup> a specific rule would remove all doubts respecting this authority and establish specific procedures for court-annexed mediation.

#### 1. Constitutional Issues and Judicial Authority to Mandate Mediation

In passing laws authorizing courts to mandate mediation in various contexts, legislatures apparently have assumed that no constitutional arguments prohibit such a power.<sup>166</sup> Although constitutional issues have from time to time been raised with respect to court-ordered informal

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<sup>162</sup> For a discussion of the relative advantages and disadvantages of private and public sponsorship, see ABA YOUNG LAWYERS DIVISION & ABA SPECIAL COMMITTEE ON ALTERNATIVE MEANS OF DISPUTE RESOLUTION, *RESOLVING DISPUTES: AN ALTERNATIVE APPROACH—A HANDBOOK FOR THE ESTABLISHMENT OF DISPUTE SETTLEMENT CENTERS* 10 (1983).

<sup>163</sup> See, e.g., ALASKA STAT. § 24.060 (1991); CAL. CIV. CODE § 4607 (West 1992); FLA. STAT. ANN. § 44.302 (West 1992); IND. CODE ANN. Rule ADR 2.2 (Burns 1993); ME. REV. STAT. ANN. tit. 19, § 752 (West 1993); OR. REV. STAT. § 107.755 (1991) (empowering courts to mandate mediation). For a general discussion of court-mandated mediation, see ROGERS & McEWEN, *supra* note 71, §§ 5.1 - 5.6; Note, *supra* note 73, at 1086-95.

<sup>164</sup> It was estimated that eventually, between 250 and 350 circuit court cases would be mediated annually. District court referrals were expected to approximate 300 per year, excluding small claims referrals.

<sup>165</sup> See FAYETTE COUNTY CIR. CT. R. 10.

<sup>166</sup> See ROGERS & McEWEN, *supra* note 71, at 47 (noting that "compulsion to use mediation has a long history").

dispute resolution processes,<sup>167</sup> they should not generally represent obstacles to court-mandated mediation.<sup>168</sup>

The right of jury trial, where it exists,<sup>169</sup> is not violated by an order to mediate where the process involves neither undue delay nor expense.<sup>170</sup> As the United States Supreme Court observed in *Capital Traction v. Hof*,<sup>171</sup> the constitutional right of trial by jury does not specify "what conditions may be imposed upon the demand of such a trial, consistently with preserving the right to it."<sup>172</sup> Accordingly, mediation, a nonbinding procedure that is conceptually no more onerous than unassisted court-ordered pretrial settlement negotiations, should not be viewed as a significant impediment to jury trial.<sup>173</sup>

Similarly, court-ordered mediation does not ordinarily offend due process. In this context, due process guarantees only freedom from irrational or unreasonable restrictions on a party's access to the courtroom, not immediate, unconditional entry.<sup>174</sup>

Although there are relatively few published decisions specifically addressing challenges to court-mandated mediation, most are supportive

<sup>167</sup> See generally Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487 *passim* (1989) (analyzing the relevant constitutional issues that arise when ADR is imposed in civil disputes).

<sup>168</sup> See Menkel-Meadow, *supra* note 1, at 30. The exception may be where mandatory mediation is "unduly expensive, imposes significant delays, or has other negative effects on the trial process." ROGERS & McEWEN, *supra* note 71, § 5.5.

<sup>169</sup> The right of jury trial either derives from federal or state constitutional guarantees. See RONALD D. ROTUNDA ET AL., *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 17.8 n.12 (1986). The existence of the right, however, depends on whether the right existed under the common law of England. See Golann, *supra* note 167, at 503. Hence, certain statute-based claims may not involve the right to a trial by jury. Examples include divorce and child custody. *Id.*

<sup>170</sup> See *id.* at 506 ("The Supreme Court has applied a reasonableness standard to evaluate claims that procedural innovations violate jury rights. Under this test, changes will be upheld even if they somewhat delay or burden a litigant's access to a jury, so long as jury trials remain available to persistent litigants.").

<sup>171</sup> 174 U.S. 1 (1899).

<sup>172</sup> *Id.* at 23; see also *In re Peterson*, 253 U.S. 300, 310-12 (1920) (holding that cost, delay, revelation of trial strategies, and effect on jury deliberations resulting from admission of judicially ordered auditor's report is not a denial of right to jury trial). For a more in-depth discussion of court-mandated mediation's affect on the right to a jury trial, see Golann, *supra* note 167, at 502-10.

<sup>173</sup> As Professor Golann succinctly concluded:

Requirements that disputants participate in ADR as a precondition to obtaining access to a court usually pose no serious constitutional concerns. If, however, the dispute resolution requirement is so poorly designed or administered that . . . serious and widespread delays in case resolution result, then the process may be struck down as an unreasonable burden on access to juries.

Golann, *supra* note 167, at 566.

<sup>174</sup> See *id.* at 541.

of such judicial authority. For instance, in *Rhea v. Massey-Ferguson, Inc.*,<sup>175</sup> the Sixth Circuit Court of Appeals upheld a local court rule requiring mediation over a defendant's arguments that the mandate violated federal jury trial rights.<sup>176</sup> Likewise, in *Woods v. Holy Cross Hospital*,<sup>177</sup> the Fifth Circuit Court of Appeals found no denial of constitutional protections in a state law requiring pre-suit mediation of medical malpractice claims, imposing mediation fees of \$200 per day (to be borne equally by non-indigent parties), and admitting the "findings" of the mediation panel in evidence at trial.<sup>178</sup>

In a departure from the apparent trend, however, the Georgia Supreme Court held that a trial court did not have authority to order parties to mediate.<sup>179</sup> The court viewed such an action as incompatible with the voluntary nature of mediation.<sup>180</sup> The court expressed its concern that the order to mediate "[could] be construed to require the parties to mediate their dispute on penalty of contempt should they fail.

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<sup>175</sup> 767 F.2d 266 (6th Cir. 1985).

<sup>176</sup> *Id.* at 270.

<sup>177</sup> 591 F.2d 1164 (5th Cir. 1979).

<sup>178</sup> *Id.* at 1181. *But see* *McLaughlin v. Superior Court*, 189 Cal. Rptr. 479 (Cal. Ct. App. 1983) (holding that trial court's admission of mediator's report without permitting cross-examination of mediator violated due process).

Although mandatory mediation has not yet inspired challenges in Kentucky, the Federal District Court for the Eastern District of Kentucky upheld the validity of its own local rule providing for summary jury trial. *See McKay v. Ashland Oil, Inc.*, 120 F.R.D. 43, 46 (E.D. Ky. 1988). This suggests that the court would uphold a rule mandating mediation since a summary jury trial is in many ways more invasive of the right to trial than mediation. *See Menkel-Meadow, supra* note 1, at 18-20.

In *Strandell v. Jackson County, Ill.*, 838 F.2d 884 (7th Cir. 1987), the Seventh Circuit overturned a contempt citation against an attorney who refused to obey a district court's order to participate in a summary jury trial, apparently because he viewed the process as an opportunity for his opponent to discover information about his case. Judge Posner's opinion depicted summary jury trial as destructive of the "carefully-crafted balance between the needs for pretrial disclosure and party confidentiality" established by rules governing pretrial discovery and protecting attorney work product. *Id.* at 888.

In light of the less intrusive character of mediation, most mandatory mediation programs would probably pass muster even under *Strandell*. *See G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1988) (en banc) (affirming the authority of a federal district court, acting under Federal Rule 16, to order parties—including those represented by counsel—to appear before it personally to discuss the posture of the case and prospects for settlement); *see also Courts Can Compel Clients to Attend Settlement Talks*, 7 ALTERNATIVES 77 *passim* (1989) (discussing the likely impact of the *Heileman Brewing Co.* case).

Under the Judicial Improvements Act of 1990, 28 U.S.C. § 473 (Supp. 1992), federal district courts are expressly authorized to refer cases to mediation and other dispute resolution processes.

<sup>179</sup> *See Department of Transp. v. City of Atlanta*, 380 S.E.2d 265 (1989).

<sup>180</sup> *See id.* at 168. *But see Semiconductors, Inc. v. Golassa*, 525 So. 2d 519 (Fla. Dist. Ct. App. 1988) (denying certiorari of a trial court's ordering of sanctions for failure to send to mediation a party authorized to settle by paying money damages).

That would amount to an order to settle the case which requires power the court does not have.<sup>181</sup> On remand, the trial court could "refer" the parties to mediation, but should either party determine that none of the issues in the case could be settled by mediation, litigation should proceed.<sup>182</sup> In light of the experience of the Mediation Center of Kentucky, the concerns of the Georgia court seem misplaced.

In the judicial setting, mediation seems a reasonable imposition on the trial process. Its intent (and likely result) will be to identify and address issues, encourage earlier settlements, and save the parties and the court system time and money.<sup>183</sup> The risks, on the other hand, are relatively minor. Mediation aims at agreement, but if no agreement is reached the march to adjudication proceeds as before. The intervention is brief, and the costs similarly limited—particularly if the program depends, like ours, upon the efforts of volunteers rather than paid mediators. Unlike some other out-of-court approaches, there is no requirement of formal case presentations by attorneys or parties; and no expectation that witness testimony or documentary evidence will be summarized. There is a mechanism for sharing information with the mediator outside the hearing of an opponent.<sup>184</sup> Aside from the order to the bargaining table, there is no coercive aspect—contrary to non-binding arbitration which penalizes a party seeking a *de novo* hearing in court who fails to increase the arbitration award by a certain percentage.<sup>185</sup> Finally, mediation normally involves no report to the court, or other communication between mediator and judge.<sup>186</sup>

## 2. Policy Considerations; Practical Concerns

The foregoing discussion necessarily assesses mediation in terms of its relation to the "ideal" of trial process. As the popular paradigm of justice, litigation exalts the goals of truth-seeking and preservation of individual rights. The elaborate minuet comprising motion practice, discovery, trial, and beyond, serves these goals only imperfectly. The demands of procedural justice subordinate the search for truth and often

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<sup>181</sup> 380 S.E.2d at 268.

<sup>182</sup> *Id.* As it happened, the referral was made, the parties mediated under the auspices of the Justice Center of Atlanta, and the dispute was resolved. See ROGERS & McEWEN, *supra* note 71, § 5.5, at 50 (Supp. 1992).

<sup>183</sup> See *infra* part VII.F.

<sup>184</sup> In these ways, mediation may be significantly less onerous than court-annexed arbitration, summary jury trial, or the like. See Menkel-Meadow, *supra* note 1, at 18-20.

<sup>185</sup> See George Nicolau, *The Road Ahead*, FORUM, Winter 1992, at 19, 20.

<sup>186</sup> See *infra* text accompanying notes 252-254.



prevent critical evidence from being admitted in the interest of promoting other public policies.<sup>187</sup> Moreover, these public policies are served at the expense of other policies: efficiency, giving parties better access to forums, reducing conflict by addressing root causes of conflict, and giving parties greater control over their destinies. These "other" objectives of dispute resolution may be better served by alternative forums, as Linda Singer recognized more than a decade ago.<sup>188</sup> Partly with this in mind, courts have channeled parties into alternative processes in their "best interest."<sup>189</sup> For similar reasons, perhaps, some empirical studies indicate that parties involved in mandatory mediation generally tend to be more satisfied with the results obtained than are parties who proceed with litigation.<sup>190</sup>

The trade offs inherent in tailoring a dispute resolution scheme may be illustrated with a familiar example from the sports world. In recent years, through the vehicle of the "instant replay," sports enthusiasts have enjoyed the ability to second-guess the calls of referees and umpires. When, in a quest for "zero-tolerance" decision making by referees, the National Football League employed this technology to permit immediate appeals of decisions made on the field, a funny thing happened—the flow of the game was disrupted, momentum disturbed, and, for many fans, viewing became a less enjoyable experience.<sup>191</sup>

Of course, the cost and risks associated with trial and appeal force most parties to settle at some point prior to trial, leading Judge Posner to question whether settlement-oriented ADR contributes anything more than another layer of procedure in the majority of cases.<sup>192</sup> In the case of mediation, there are a number of responses. As we have seen, mediation offers a number of qualitative advantages over unassisted negotiation or "predictive processes." For instance, if employed early in the pre-trial process, it may advance significantly the date of settlement. Most

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<sup>187</sup> See Weckstein, *supra* note 31, at 606-07, 611-15. Of course, under the most elaborate procedures our courts can provide we are left not with the truth but rather with someone's perception of the truth. The fallibility of such perceptions is reflected in the cynical confession of a former student of mine, now a local attorney, regarding a construction-related controversy: "We had no case, so instead of seeking to enforce the contractual arbitration provision we asked for a jury." He got the jury and, what's more, he won the case.

<sup>188</sup> See Singer, *supra* note 72, at 571.

<sup>189</sup> See generally Note, *supra* note 73, at 1093 n.66 (stating that courts traditionally justified ordering alternative processes as being in the parties' best interests).

<sup>190</sup> See generally *id.* at 1093 n.62 (discussing various empirical studies).

<sup>191</sup> See Frank Deford, *Bring Back Bad Bounces*, SPORTS ILLUSTRATED, Feb. 1, 1988, at 78.

<sup>192</sup> See Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 388-89 (1986).

critically, our own initial experience indicates that mediation sometimes settles cases that would otherwise go to trial.<sup>193</sup>

Another broadside criticism of ADR focuses on the individual case. Whatever the systemic advantages, say critics, efficiency may be decreased from the standpoint of decision makers who are forced to participate in the process against their will.<sup>194</sup> The most evocative metaphor compares coercing people to go through ADR "to requiring a cancer patient to have radiation treatment before going to surgery, when surgery is the patient's first choice."<sup>195</sup> In the sometimes coercive atmosphere of ADR proceedings, the argument continues, harmony is compelled at the expense of justice.

However valid efficiency concerns may be with respect to other ADR processes, they are rarely serious issues in mediation. If mediation fails, the expenditure of time and effort is usually relatively minor—not more than a few hours—and the cost commensurately small—particularly with unpaid mediators. The element of coercion in mediation proceedings is a more elusive factor, although one would assume that this concern may be attenuated in cases where parties are represented by counsel, as is always the case in court-referred cases.<sup>196</sup>

On the other hand, for mediation to receive broad-based attention, the support of existing institutions is significant if not crucial, and compulsion can play an important role.<sup>197</sup> For any number of reasons, parties may fear the consequences of mediation or, in some situations, feel that the decision is out of their control.<sup>198</sup> For a variety of reasons, such as mistrust of the opposition, fear that mediation is less than zealous advocacy, or fear of losing of control, counsel may likewise be reluctant to mediate.<sup>199</sup> Our experience, like that of others, has shown that in many cases, reluctant parties and skeptical counsel change their minds about the process and about the prospects of settlement during mediation.<sup>200</sup> Significantly, comparisons of

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<sup>193</sup> See *infra* part VII.G.

<sup>194</sup> See Menkel-Meadow, *supra* note 1, at 22.

<sup>195</sup> Nader, *supra* note 116, at 13. As Professor Nader observes, "[t]he assumption that change in the delivery of justice is to be achieved by adding mediators or arbitrators illustrates a blindness to the importance of social and cultural structures that produce legal problems." *Id.* at 12-13.

<sup>196</sup> While parties to small claims cases do not normally enjoy representation by counsel, the "justice" that they forego by mediated agreement is often a seat-of-the-pants, Wapner-esque application of native intuition and burden of proof.

<sup>197</sup> As Judge Etheridge has explained, suits, countersuits, third party practice, and "the usual plethora of motions are almost always contrived—and not at the heart of the real dispute. Mediation, skillfully handled, avoids masking the real issues." Etheridge, *supra* note 30, at 33.

<sup>198</sup> See generally Millhauser, *supra* note 51, at 29-31 (discussing various client concerns).

<sup>199</sup> See *id.* at 31-32.

<sup>200</sup> Professor Menkel-Meadow notes:

At first blush, it is easier to suggest that ADR should be used only consensually to preserve the kind of settlement culture that is motivated to reach voluntary and consensual

settlement rates of court-referred cases and voluntarily submitted disputes suggest similarly favorable results.<sup>201</sup>

In 1991, the Society of Professionals in Dispute Resolution ("SPIDR") issued a report on mandatory dispute resolution that found that "[m]andating participation in non-binding dispute resolution processes often is appropriate."<sup>202</sup> It cautioned, however, that compulsory programs should be carefully structured to address various concerns of the parties, affected non-parties, and the justice system.<sup>203</sup> Recent standards for court-connected mediation offer guidelines for the balancing of these interests. The standards suggest that mandatory mediation should be employed only if: (1) there is adequate funding to assure that all have access to the program, (2) there is no inappropriate pressure to settle, and (3) a program of high quality is available.<sup>204</sup>

Since mediation is by definition a non-adjudicative (anti-adjudicative?) process, there is little or no basis for a challenge based upon improper delegation of judicial functions.<sup>205</sup> Indeed, referral to

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agreement without the "taint" of coercion and unproductive adversarialness. But in my own experience as both a mediator and a litigator, I have seen many good settlements emerge through the skilled intervention or facilitation of the parties by skilled negotiators or third parties, even in cases where settlement seemed impossible.

Menkel-Meadow, *supra* note 1, at 42 (emphasis added) (citations omitted). This corresponds with the author's experience.

Structured interviews conducted by the Florida Dispute Resolution Center revealed that a number of attorneys who "initially were negative about mediation have since come around." Alfim, *supra* note 112, at 62.

<sup>201</sup> See Note, *supra* note 73, at 1094; see also Barbara Filner, *Community Mediation in the Courts of Justice*, FORUM, Winter 1992, at 17, 18 (finding that at San Diego Mediation Center, court-referred cases settle in same proportion (60% to 70%) as do non-court cases); McEwen & Maiman, *supra* note 82, at 249-55 (relaying empirical results of small claims mediation in Maine).

<sup>202</sup> Society for Professionals in Dispute Resolution, *Mandated Participation and Settlement Coercion: Dispute Resolution as It Relates to the Courts*, ARB. J., March 1991, at 38, 38.

<sup>203</sup> SPIDR's recommendations recognized as relevant concerns:

the monetary and emotional costs for the parties, as well as the interests of the parties in achieving results that suit their needs and that will last; the justice system's ability to deliver results that do not harm the interests of those groups that have historically operated at a disadvantage in this society; the need to have courts function efficiently and effectively; the importance of the public's trust in the justice system; the interests of non-parties whose lives are affected and sometimes disrupted by litigation; the importance of the courts' development of legal precedent; and the general interest in maximizing party choice.

ROGERS & McEWEN, *supra* note 71, § 52, at 39-40 (1992 Supp.) (reprinting SPIDR's recommendations).

<sup>204</sup> See *MEDIATION STANDARDS*, *supra* note 94, § 5.1.

<sup>205</sup> See Golann, *supra* note 167, at 530-31 (finding that state courts have upheld requirements that disputants participate in nonbinding ADR against delegation of powers challenges since they do not usurp the authority of the court to finally adjudicate the case); see also Menkel-Meadow, *supra* note 1, at 30 (noting that separation of powers claims fail because of protections inherent in ADR such

mediation represents a recognition of the limitations of litigation and the role of judges in that process.

### *B. The Circuit Court Mediation Rule*

In March, 1992, the Fayette Circuit Court gave notice of a pilot project that it was implementing as a result of Fayette County Circuit Court Rule 10, which gave judges discretion to order civil cases to mediation.<sup>206</sup> Circuit Court Rule 10 was an important first step in laying the groundwork for the Mediation Center of Kentucky. The rule, which borrowed heavily upon portions of the Florida circuit court mediation procedures,<sup>207</sup> authorized judges to refer civil disputes<sup>208</sup> (except for election contests, habeas corpus actions, appeals, or actions for injunctive relief) to mediation at the completion of pre-trial pleading, "or at any other time prior to trial."<sup>209</sup> Referral to mediation would not operate as a stay of discovery procedures unless otherwise ordered by the court or stipulated by the parties.

Rule 10 also established certain broad parameters for mediation, authorizing the mediator to direct the scheduling of conferences with the parties (and even permitting telephonic conferences).<sup>210</sup> Additionally, the rule provided for court-ordered sanctions for nonparticipation, and attempted to protect communications made in mediation. In the same vein, the rule strictly limited communications between mediator and court. Because Rule 10 was intended to be used in tandem with the Guidelines and Procedures of the Mediation Center,<sup>211</sup> provisions governing mediator appointment and qualifications were not included in the initial rule.<sup>212</sup>

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as nonbinding results, right to de novo hearings and limited penalties).

<sup>206</sup> FAYETTE COUNTY CIR. CT. R. 10 [hereinafter Rule 10]. The original version of Rule 10 is reproduced in Appendix A1. Proposed changes to Rule 10 currently being considered by the Fayette County Circuit Court [hereinafter Revised Rule 10] are contained in Appendix A2.

<sup>207</sup> See FLA. R. CIV. P. 1.700-1.780.

<sup>208</sup> Although handling minor criminal matters was theoretically an option, see William Greenawalt, *Alternatives to Court Resolution of Disputes: Report of NYSBA's Special Committee*, N.Y. Sr. B. J., Oct. 1984, at 36 (discussing Community Dispute Resolution Program); see *supra* text accompanying notes 141-143 (discussing City of Cincinnati Law Department Prosecutor's Office Private Complaint Program), disputes involving misdemeanors were already being addressed by the Dispute Mediation Program of the District Court. See *supra* note 160.

<sup>209</sup> FAYETTE COUNTY CIR. CT. R. 10.A.

<sup>210</sup> No mediations have been conducted by telephone at the Mediation Center, and it is doubtful that the technique would be effective in circuit court cases (although there are precedents for the approach in lemon law mediation in this state). It is anticipated that this provision will be deleted when the court rule is amended.

<sup>211</sup> See *infra* notes 228-229 and accompanying text.

<sup>212</sup> Proposed changes currently before the court would authorize parties to seek disqualification of a mediator for good cause. See Revised Rule 10, *supra* note 206, B.2.

### 1. *Input From the Bar*

Prior to its adoption by the circuit court, a draft of the mediation rule was published in the court bulletin and discussed at an open meeting of the Fayette County Bar. Constructive criticisms by participants resulted in a number of changes to the draft rule. For example, the draft originally authorized the mediator, "by placing an appropriate entry of record, [to] refer any case back to the court because the case was inappropriate, because the parties are not cooperating with the mediator, or for other good cause which shall be provided in writing to the court."<sup>213</sup> The concern was raised that permitting the mediator to label a party as uncooperative would stigmatize the party in later court proceedings and open the door to subpoenas of the mediator. In the revised rule, the language regarding "uncooperativeness" was deleted.<sup>214</sup>

It was also recommended that some procedure be put in place to ensure mediator neutrality and address conflicts of interest. The rule was not amended, since the whole purpose of the pilot project was to direct the parties to the Mediation Center, which would address mediator disclosure and disqualification in its procedures.<sup>215</sup> The process also encouraged a number of respected trial attorneys to come forward as candidates for training as mediators. The rule was approved by the Circuit Court in late March and became effective upon its approval by the Kentucky Supreme Court.

### 2. *Judicial Discretion*

Rule 10 gives judges considerable discretion regarding the timing of mediation. This discretion was intentional since there is a well-recognized tension between the benefits of assigning cases early on, thus increasing potential cost savings, and the advantages of waiting until discovery has helped to clarify issues and facts.<sup>216</sup> Some commentators encourage the use of mediation prior to discovery or early in the process,<sup>217</sup> thus increasing potential cost savings and avoiding the hardening of positions that sometimes

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<sup>213</sup> Draft, FAYETTE COUNTY CIR. CT. R. 10 (on file with the author).

<sup>214</sup> Rule 10.

<sup>215</sup> The absence of provisions addressing mediator neutrality is nevertheless a drawback of the present rule. See *MEDIATION STANDARDS*, *supra* note 94, § 8.1 (providing that courts should adopt ethical standards for mediators, including provisions addressing impartiality and conflict of interest). The circuit court is currently considering a proposed amendment which would permit any party to seek an order disqualifying an appointed mediator for good cause. See Revised Rule 10, *supra* note 206, B.2.

<sup>216</sup> See Woods, *supra* note 130, at 435.

<sup>217</sup> See Costello, *supra* note 88, at 19 (citing Carl A. Mounteer, *CAL. LAW.*, Nov. 1990, at 128).

occurs with time. If mediation is ordered on the eve of trial or arbitration, it is argued, the preparatory work for trial has been done and there is less financial incentive to settle.<sup>218</sup>

On the other hand, it appears that, in some situations, certain discovery—the deposition of a key fact witness, for example—can have a significant impact on the posture of a case.<sup>219</sup> Likewise, some motions can have a dramatic impact on the attitude of the parties toward settlement.<sup>220</sup> Preliminary results from recent studies of Florida mediators by Jim Alfini reflect the lack of a consensus on timing.<sup>221</sup> Thus, assembling general guidelines regarding appropriate timing of referrals poses a difficult problem.<sup>222</sup>

From the beginning of the pilot period, however, at least one judge made it known that during the first months of the mediation program he would pay close attention to the circumstances under which settlement was achieved, and those in which mediation did not result in settlement. Moreover, interchanges between Center mediators have brought about reforms in the process, including a screening process in cases involving division of marital property to make certain that relevant assets have been valued prior to mediation. In some cases there may be pending motions, a critical deposition, or other actions that are obstacles to successful mediation. In these cases the mediator may identify such items to the court in writing, but only with the consent of the parties.

Planners of the mediation program recognized that the success of the Mediation Center depended upon limiting its effort to the available resources. This strategy was especially critical in the early months of operation, when considerable administrative time and energy were devoted to developing office procedures and education, and before a sizable cadre of mediators had been trained. Since court referrals were the chief determinant of the volume and mix of cases at the Mediation Center, the court's cooperation was necessary to ensure that such referrals remained at manageable numbers. For example, although judges were

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<sup>218</sup> See Fisher, *supra* note 125, at 59-60.

<sup>219</sup> See Brazil et al., *supra* note 67, at 281.

<sup>220</sup> See *id.*

<sup>221</sup> See Alfini, *supra* note 112, at 61 (finding no group consensus among experienced mediators regarding time when case is ripe for mediation).

<sup>222</sup> Professor Menkel-Meadow has concluded that there is no "magic taxonomy of case types that will permit easing allocation" to mediation and other processes. Menkel-Meadow, *supra* note 1, at 34. The new National Standards provide that, as a rule, "referral should be made at the earliest possible time that the parties are able to make an informed choice about their participation in mediation." MEDIATION STANDARDS, *supra* note 94, § 4.4. The Standards further provide, however, that where "referral is mandated, parties should have input on the question of when the case should be referred to mediation, but the court itself should determine timing." *Id.* § 4.6.

particularly eager to refer divorce and child custody matters, which comprise a full third of their total caseload, to the Center they moderated referrals pending special training of additional domestic mediators.

### 3. *The Obligation to Appear and the Role of Attorneys*

Rule 10 requires parties to appear at the mediation conference. Unless otherwise agreed by the parties, "appearance" means that the party, or a representative having settlement authority, must be present, along with the party's attorney of record, if any.<sup>223</sup> In insurance cases, the rule specifically requires the presence of "[a] representative of the insurance carrier for any insured party who is not such a carrier's outside counsel and who has full authority to settle without further consultation."<sup>224</sup>

The rule further states that if a party fails to appear at a duly noticed mediation session without cause, the court upon motion shall impose sanctions against the absent party, including attorney's fees and costs. On the other hand, the court does not expressly require the parties to "bargain in good faith" or even to remain at the conference for any specific length of time.<sup>225</sup> Although recalcitrant parties are a recurring problem in this and other programs,<sup>226</sup> and there is a recent trend to establish rules governing conduct in mediation,<sup>227</sup> such provisions are extremely difficult to apply in practice.<sup>228</sup> Already the problem has inspired published decisions, and there will be more as lawyers sink their teeth into the issue using the tools they know best.<sup>229</sup>

Attorneys are required to be present at mediation conferences under Rule 10, although by agreement the parties sometimes may appear without counsel.<sup>230</sup> The rule does not define the role of attorneys or

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<sup>223</sup> An amendment currently being considered by the circuit court would require the presence of a party, "or a representative (other than the party's counsel of record)." The presence of counsel of record would be permitted but not required. Revised Rule 10, *supra* note 206, C.4.

<sup>224</sup> FAYETTE COUNTY CIR. CT. R. 10.

<sup>225</sup> Indeed, the rule provides that mediation shall cease, among other things, when the parties "are unwilling to proceed further." *Id.*

<sup>226</sup> See Alfin, *supra* note 112, at 63 (noting concern of some Florida mediators and attorneys that parties just show up and "go through the motions").

<sup>227</sup> See generally ROGERS & McEWEN, *supra* note 71, § 5.3 (describing state and federal statutes and rules); Note, *supra* note 73, at 1096 (noting that some statutes have recently been amended to require meaningful participation by all parties).

<sup>228</sup> See Alfin, *supra* note 112, at 64-66 (noting problems with enforcement of a mediation-in-good-faith rule that depends upon subjective criteria).

<sup>229</sup> See Menkel-Meadow, *supra* note 1, at 31 n.162.

<sup>230</sup> See MEDIATION STANDARDS, *supra* note 94, § 5.1(c) (providing that mandatory programs should permit lawyer participation when the parties wish it); *id.* § 10.2 (recommending that parties,

offer any clue as to the part they are to play in mediation. It is clear, however, that attorneys may sometimes play a valuable role in the mediation process, and there certainly is no ethical bar to such participation in the Commonwealth.<sup>231</sup> In our program, attorney participation is guided by the Mediation Center Guidelines.<sup>232</sup>

#### 4. Confidentiality

Confidentiality has been well recognized as a necessary means of encouraging full and frank exchanges within mediation.<sup>233</sup> The same policies underlying evidentiary rules that limit the discovery and admissibility of communications made during the course of settlement discussions<sup>234</sup> and the desire to encourage the use of mediation have persuaded a number of states to enact some form of legislation limiting the admissibility of information exchanged in mediation. These limits on admissibility vary widely in form and scope.<sup>235</sup> Other statutes and judicial opinions establish a privilege for communications made within mediation.<sup>236</sup> Kentucky has no such laws of general application.

General evidentiary rules provide only limited protection for statements made during the course of settlement discussions. Kentucky's statute, modeled on Federal Rule of Evidence 408, applies only to compromise discussions where there is a claim that is disputed as to validity or amount.<sup>237</sup> It thus falls far short of covering the full range of issues that are likely to be addressed in mediation. Furthermore, the Kentucky rule, like the federal provision and most state protective rules,

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in consultation with their attorneys, should have right to decide whether attorney should be present). *But see supra* note 223 (proposed amendment makes presence of attorney permitted but not required; rule clarified to indicate that attorney may not appear without party unless parties otherwise agree).

<sup>231</sup> See Ethics Comm. of the Kentucky Bar Ass'n Op. E-335, 53 KY. BENCH & BAR, Summer 1989, at 47 (allowing lawyers to participate in divorce mediation, either in the role of mediator or independent counsel for a party).

<sup>232</sup> See MEDIATION CENTER OF KENTUCKY, INC., GUIDELINES AND PROCEDURES FOR MEDIATION [hereinafter GUIDELINES].

<sup>233</sup> See ROGERS & MCEWEN, *supra* note 71, § 8.2; see also Brazil et al., *supra* note 67, at 282 (noting that evaluators must maintain confidentiality to encourage full and frank communications by parties, at least with respect to positions and case evaluation).

<sup>234</sup> See ROGERS & MCEWEN, *supra* note 71, § 8.1.

<sup>235</sup> See generally *id.* §§ 8.3-8.8 (discussing evidentiary exclusions for compromise discussions); Bruce Larson & Susan Hansen, *Ethics in ADR: Issues of Confidentiality and Neutrality*, 22 BRIEF, Fall 1992, at 14, 16. The new Administrative Dispute Resolution Act also contains confidentiality provisions. See Administrative Dispute Resolution Act, 5 U.S.C. § 584 (Supp. 1992).

<sup>236</sup> See ROGERS & MCEWEN, *supra* note 71, §§ 8.10-8.17; see also Jennifer A. Mastroski, *Reexamination of the Bar: Incentives to Support Custody Mediation*, 9 MEDIATION Q., Fall 1991, at 21, 28 (discussing various ADR groups' ethics rules regarding confidentiality).

<sup>237</sup> KY. REV. STAT. ANN. § 422A.0408 (Baldwin Supp. 1993).



excludes evidence only if it is offered for the purpose of proving liability for or the invalidity of a claim or its amount. It "does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."<sup>238</sup> Finally, such provisions may provide no protection in other forums not bound by the rules of evidence,<sup>239</sup> and protect only those with standing.<sup>240</sup>

There are, of course, other options in the individual case. Judicial protective orders, included in orders of referral, may be an effective tool.<sup>241</sup> Private nondisclosure agreements between the parties may also provide some protection, although they do not represent a guarantee that disclosures will not be made, or that there will be an adequate remedy if they are.<sup>242</sup>

The drafters of Rule 10 sought to establish a consistent policy offering a higher degree of protection to statements made in mediation than that provided by existing rules. Based on a then-pending amendment to the Florida statute, the rule was conceived as the first of several planned tiers of protection for communications made in mediation.<sup>243</sup> The rule provides that "all mediation documents and mediation communications are privileged and confidential and shall not be disclosed."<sup>244</sup> Such information is "not subject to disclosure through discovery or any other process, and not admissible into evidence in any judicial or administrative proceeding."<sup>245</sup> The provision also states that "[n]o part of the mediation proceedings shall be considered a public record."<sup>246</sup>

The rule's protections, while broad, are by no means absolute. Disclosure may be made if all parties consent in writing, if the information relates to child abuse or neglect and is required to be disclosed, or if "the ..

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<sup>238</sup> *Id.* See generally ROGERS & McEWEN, *supra* note 71, § 8.6 (discussing purposes for which settlement discussions have been admitted).

<sup>239</sup> See ROGERS & McEWEN, *supra* note 71, § 8.7.

<sup>240</sup> See *id.* § 8.8.

<sup>241</sup> See *id.* § 8.21.

<sup>242</sup> See *id.* § 8.25 (discussing the effectiveness and policy considerations of nondisclosure agreements); see also Larson & Hansen, *supra* note 235, at 16 (discussing nondisclosure agreements as a way of preserving confidentiality). These limitations, however, did not prevent the Mediation Center from requiring such an agreement by all mediating parties, since it is likely that such agreements do act as a general deterrence against disclosure. See *infra* text accompanying notes 274-275.

<sup>243</sup> Other protections were to be provided by the Agreement to Mediate, the Guidelines and Procedures of the Mediation Center, and Center practices. See *infra* text accompanying notes 274-278.

<sup>244</sup> FAYETTE CO. CIR. CT. R. 10.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

communications were made in furtherance of the commission of a crime or fraud or as part of a plan to commit a crime or fraud.<sup>247</sup>

In addition, the rule specifically covers only cases referred by the circuit court, and not disputes arriving at the Center from other sources. Likewise, the rule does not clearly address communications involving nonmediators, including intake personnel and others involved in the administration of a case referred to mediation at the Center, and notes made by these individuals. An effort has been made to keep such communications and records to a minimum.

The confidentiality provision of Rule 10 may also be subject to other limitations, such as the constitutional right of a criminal defendant to confront witnesses.<sup>248</sup> And while the public right of access to trials generally should not guarantee access to settlement discussions,<sup>249</sup> sunshine laws may do so when one of the parties is a public agency.<sup>250</sup> Finally, even if parties are required to participate in a private settlement process that must be kept confidential, there are no limits on subsequent publicity if the case goes to trial (so long as the settlement negotiations themselves are kept confidential).<sup>251</sup>

Related to concerns regarding preserving confidentiality were questions regarding the nature of the mediator's communications with the court. The reporting requirements of Rule 10 reflect the perception that such communications should be minimal in number and content. The mediator is required to notify the court only when: (1) a case is not accepted for mediation, (2) a case is referred back after it has been accepted, or (3) the mediation process has ended.<sup>252</sup> If mediation ends without agreement, the mediator is also required to report the fact "without comment or recommendation."<sup>253</sup> The final report may also "identify any pending motions, outstanding legal issues, discovery process or other action which, if resolved or completed, would facilitate settlement," but only if the parties consent.<sup>254</sup>

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<sup>247</sup> *Id.*

<sup>248</sup> See *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974); see also *ROGERS & McEWEN*, *supra* note 71, § 8.17 (discussing the impact of a criminal defendant's right to confront witnesses on the confidentiality of mediation proceedings).

<sup>249</sup> See, e.g., *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 854 F.2d 900 (6th Cir. 1988). This case is discussed in *Menkel-Meadow*, *supra* note 1, at 23-24, 26-28.

<sup>250</sup> See generally *ROGERS & McEWEN*, *supra* note 71, § 8.29 (discussing public access to records); *Menkel-Meadow*, *supra* note 1, at 29-30 (examining the issues raised regarding public access to records under Florida's sunshine law).

<sup>251</sup> See *Menkel-Meadow*, *supra* note 1, at 27-28.

<sup>252</sup> *FAYETTE CO. CIR. CT. R. 10.*

<sup>253</sup> *Id.*

<sup>254</sup> This general approach is consistent with recently promulgated recommended standards. See

Neither Rule 10 nor circuit court procedures provide for an explanation to parties and attorneys of the nature and functions of mediation.<sup>255</sup> Given the close proximity of the Center to the courts, however, information (including copies of pertinent guidelines and procedures) is easy to obtain. In the interest of addressing these questions at the time of referral, however, printed brochures containing the most commonly asked questions and answers regarding mediation at the Center have been provided to the judges for distribution.

### III. MEDIATION CENTER RULES AND PROCEDURES

On June 1, 1992, the Mediation Center of Kentucky opened its doors in central Lexington, across the street from the Fayette County Courthouse. The summer was spent organizing the office and developing and refining guidelines and procedures, standard forms and letters, and policies for volunteers and mediators.

On August 1, 1992, Kathy Binder began her appointment as the Center's full-time director. She was joined two months later by a full-time staff assistant and case administrator, Pat Allen.

The speed with which the Mediation Center's proposals became practical reality was due in large part to the commitment of the Fayette County Circuit Court, whose master commissioner's office provided partial funding to the Center as a part of the court's mediation pilot project.

The structure of mediation at the Center is generally determined by the Guidelines and Procedures for Mediation.<sup>256</sup> The Guidelines were designed to address essential questions regarding the process and to provide mediators and participants with considerable latitude in developing their own procedures while avoiding unnecessary formalities.<sup>257</sup> The Guidelines are supplemented by the Policies and Procedures for Mediators.<sup>258</sup>

#### *A. Mediator Appointment, the Agreement to Mediate, and the Mediation Session*

When a case is referred to the Center, the Director or Case Manager usually appoints two mediators to hear the case. The co-mediation concept

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MEDIATION STANDARDS, *supra* note 94, § 12.0 (discussing limitations on communications between mediators and court).

<sup>255</sup> The STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS recommend that information on the program and process be provided by the court. *Id.* § 3.2(b).

<sup>256</sup> See GUIDELINES, *supra* note 232.

<sup>257</sup> See *id.* § X.

<sup>258</sup> See MEDIATION CENTER OF KENTUCKY, INC., POLICIES AND PROCEDURES FOR MEDIATORS (July 1992) [hereinafter MEDIATOR POLICIES].

has been employed successfully in a number of other programs.<sup>259</sup> Responding to an independent study,<sup>260</sup> twenty-three Center mediators identified various advantages of the team approach. First, different points of view increase the potential for identifying issues of various kinds and assist in generating movement.<sup>261</sup> Moreover, multiple mediators can reduce concerns regarding perceived mediator bias; with this in mind, male and female mediators normally are teamed for domestic mediation. Additionally, co-mediation provides a valuable means of training inexperienced mediators.<sup>262</sup> Although it is essential that co-mediators have a mutual understanding regarding their respective roles in mediation, this has not proven to be a problem.

The Center contacts potential mediators by phone to determine whether they are willing and able to accept appointment in a particular case. Since "[t]he effectiveness of the Mediation Center depends upon the perception as well as the reality of impartiality on the part of Center volunteers," mediators are generally admonished to "consider whether or not [they have] potential conflicts or scheduling constraints which would preclude service."<sup>263</sup> Mediators are cautioned against accepting appointment in any case where they do not believe they can serve with impartiality. In any case, mediators must disclose to the Center Director or Case Manager "past or present business, social or personal relationships with parties or their counsel."<sup>264</sup> If the Center elects to move forward with the appointment in spite of these relationships, the information must be shared with the parties in order to give them the opportunity to raise objections to the appointment.<sup>265</sup>

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<sup>259</sup> See Filner, *supra* note 201, at 18 (describing co-mediation in San Diego's mediation program); Greenawalt, *supra* note 208, at 40 (describing state programs encouraging the use of two-member teams consisting of a lawyer and a mental health professional in divorce/custody cases). In Massachusetts, community mediators work in teams of two that are selected to "mirror" either the parties' race or sex. See Davis, *supra* note 93, at 308.

<sup>260</sup> The study was conducted by a doctoral candidate in the University of Kentucky College of Communications. The survey consisted of 28 open-ended questions relating to mediators' perceptions and experiences in mediation, and, specifically, those behaviors and tactics that they found most useful in mediation. See Jill W. Hall, *The Competent Mediator: A Communication Alternative* (Feb. 1993) (unpublished manuscript, on file with the author).

<sup>261</sup> *Id.* (manuscript at 20).

<sup>262</sup> *Id.* (manuscript at 21).

<sup>263</sup> See MEDIATOR POLICIES, *supra* note 258.

<sup>264</sup> See *id.*

<sup>265</sup> The Model Code of Professional Responsibility permits a lawyer to act as an "impartial arbitrator or impartial mediator" in matters involving present or former clients if there is disclosure of the relationship. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5-20 (1985).

Draft ethics rules for Center mediators do not prohibit a mediator from later representing parties in the future, so long as it is not in the same case. *But see Standards of Practice for Family Mediators*, 17 FAM. L.Q. 455, 457 (1984) (prohibiting mediators from representing a party before,

When the parties arrive for mediation, the first order of business is the signing of the Agreement to Mediate. This document establishes requirements of confidentiality that provide an additional tier of protection for communications made in the process.<sup>266</sup> The Agreement makes it clear that the Mediation Center does not provide legal or financial advice, and encourages parties to seek such advice from qualified professionals. It also absolves the Mediation Center and the mediator(s) from liability to the parties "for the results of the mediation, whether or not the [p]arties resolve their dispute."<sup>267</sup> Finally, the Agreement incorporates by reference the Guidelines and Procedures for Mediation, which, among other things, require the parties "to make a good faith attempt to settle the dispute through mediation, to cooperate with the mediator, and to be open, candid, and complete in [their] efforts to resolve the dispute."<sup>268</sup>

Few rules are established for the mediation session. The mediator is in charge, "acting as moderator and referee."<sup>269</sup> Although the Guidelines indicate that, generally, written material shall not be furnished to the mediator prior to mediation, the parties may submit whatever material and information the mediator deems necessary.<sup>270</sup> Since mediation is aimed at reaching agreement and is not an evidentiary hearing, the Center discourages the use of witnesses.<sup>271</sup>

Mediators are provided with general guidelines for seating the parties, explaining the process, party statements and discussion, private caucuses with individual parties, and concluding the mediation. If the parties reach an agreement, the Guidelines contemplate the preparation of a written agreement during the mediation conference that will incorporate all settlement terms.<sup>272</sup> The Policies and Procedures for Mediators recognize, however, that in some cases a party may wish to have an attorney or other third party review the agreement, or answer some factual question raised by the discussions.<sup>273</sup> Accordingly, a follow-up conference will be appropriate in such cases.

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during or after mediation).

<sup>266</sup> This form of protection is limited to signatories, and is subject to certain other exceptions. See Larson & Hansen, *supra* note 235, at 16.

<sup>267</sup> Mediation Center of Kentucky, Agreement to Mediate 2.

<sup>268</sup> GUIDELINES, *supra* note 232, § I. To effectively emphasize this obligation at the time of mediation, the requirement should be conspicuously restated in the first lines of the Agreement to Mediate.

<sup>269</sup> MEDIATOR POLICIES, *supra* note 258.

<sup>270</sup> See GUIDELINES, *supra* note 232, § X. Despite the general rule, a number of personal injury and domestic mediators request some information on the nature of the issues in dispute. A summary is often furnished by clerks of the court.

<sup>271</sup> See *id.* § V.

<sup>272</sup> See *id.* § VII.

<sup>273</sup> MEDIATOR POLICIES, *supra* note 258.

### *B. Preserving Confidentiality*

Both the Agreement to Mediate and the Guidelines and Procedures for Mediation contain provisions purporting to bind the parties and the mediator to strict obligations of confidentiality. Among other things, the Agreement characterizes mediation as a "privileged settlement conference;" forbids disclosures of settlement terms or the reasons for impasse (except as permitted by reporting requirements in the Guidelines);<sup>274</sup> forbids subpoenas directed against documents resulting from the mediation or against mediators and other agents of the Center; and forbids parties from seeking to introduce evidence of statements or conduct during mediation in later proceedings.<sup>275</sup>

Another layer of protection for confidential information is afforded by the use of caucuses; that is, separate meetings with individual parties. Mediators are obliged to maintain confidences shared in these sessions if requested to do so by a party.<sup>276</sup>

Communications between the mediator and the court are limited to a mediation report filed at the conclusion of mediation.<sup>277</sup> In fact, as a matter of Center policy such reports are filed by the Director of the Center so as to avoid direct communications between the mediator and the court. The report typically is limited to a statement that the mediation has ended, and whether there was full settlement, partial settlement, or no agreement. No comment or recommendation is permitted, except that with the parties' consent, the mediator may identify pending motions, legal issues, discovery procedures or other action that would facilitate settlement.<sup>278</sup>

### *C. The Mediator's Role*

Center mediators do not "represent" parties,<sup>279</sup> and are obliged not to provide legal advice or professional counsel.<sup>280</sup> In their role as agents

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<sup>274</sup> See GUIDELINES, *supra* note 232, § VIII.

<sup>275</sup> Mediation Center of Kentucky, Inc., Newsletter, Jan. 1993, at 1. The Society of Professionals in Dispute Resolution ("SPIDR") and the Academy of Family Mediators ("AFM") both impose ethical obligations of confidentiality on mediators. See Mastrofski, *supra* note 236, at 28.

<sup>276</sup> See GUIDELINES, *supra* note 232, § II.

<sup>277</sup> See *id.* § VIII.

<sup>278</sup> See *id.* § VIII. This provision tracks the language of the circuit court mediation rule. FAYETTE COUNTY CIR. CT. R. 10.E.5. The guidelines are also consistent with the standards promulgated by the Center for Dispute Settlement and the Institute of Judicial Administration. See MEDIATION STANDARDS, *supra* note 94, § 12.0.

<sup>279</sup> This is generally true of mediators. See Greenawalt, *supra* note 208, at 36.

<sup>280</sup> See GUIDELINES, *supra* note 232, § III.

of reality, however, mediators sometimes field questions regarding, for example, the likely disposition of a case at trial. Responses vary,<sup>281</sup> but Center mediators are repeatedly cautioned to avoid ironclad predictions or conclusions regarding legal or factual issues. Mediators do not receive evidence under oath and rarely have a grasp of the whole picture that may emerge at trial. They are retained only to facilitate a meeting of the minds.

Mediating parties are "expected and encouraged to retain their own legal counsel."<sup>282</sup> In some situations mediators may find it necessary to refer parties to their attorneys for advice.<sup>283</sup> On occasion, regrettably, attorneys "dump" cases into mediation without adequately preparing their clients; in such circumstances it may be appropriate to postpone further mediation until attorney and client have done their homework.

In some cases, it may be apparent to the mediator that the presence of an attorney is necessary to communicate on behalf of a party, or to redress a perceived imbalance in bargaining power.<sup>284</sup> Of course, such imbalances may also require a mediator to call a halt to mediation,<sup>285</sup> as in cases of spouse abuse.<sup>286</sup> In an effort to identify such cases prior to mediation, the Center recently established screening procedures for domestic disputes.<sup>287</sup> The development and implementation of these procedures is one of the most innovative aspects of the current program.<sup>288</sup>

From the early days of the project, there was much discussion regarding the propriety of combining mediation and adjudication functions. The general concern was that unless parties could be assured

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<sup>281</sup> See Fisher, *supra* note 125, at 63-64 (noting that a mediator may respond to questions regarding results in arbitration or trial); Jacobs, *supra* note 85, at 33 (providing an example of a mediator telling parties to complex commercial agreement "how this is going to play in court and what the likely damages are"); Mastrofski, *supra* note 236, at 26 (providing an example of a mediator informing parties as to likely disposition of child custody case by judge).

<sup>282</sup> GUIDELINES, *supra* note 232, § III.

<sup>283</sup> See Larson & Hansen, *supra* note 235, at 16.

<sup>284</sup> See Singer et al., *supra* note 119, at 290.

<sup>285</sup> See Greenawalt, *supra* note 208, at 40 (discussing concerns regarding imbalance of bargaining power).

<sup>286</sup> See Penny L. Willinch, *Resolving the Legal Problems of the Poor: A Focus on Mediation in Domestic Relations Cases*, 22 CLEARINGHOUSE REV. 1373, 1377 (1989) ("In the domestic violence situation, mediation has been deemed dangerous for the battered woman, because neither good faith nor equality of bargaining power exists in a battering relationship.") (footnote omitted); Woods, *supra* note 130, at 435 ("Mediation trivializes family law issues by relegating them to a lesser forum.").

<sup>287</sup> See Gary W. Paquin, *The Development and Organization of Domestic Relations Mediation in a Multi-Function Mediation Center in Kentucky*, 81 KY. L.J. 1133, 1144 (1992-93).

<sup>288</sup> The development of these procedures was largely the work of the Center's current Vice-President, Linda Harvey.

that the mediator would have no role to play in the later adjudication, they would be unable to fully and freely discuss their position and settlement prospects with the mediator. Likewise, there are legitimate concerns that *ex parte* communications between parties and the mediator will influence the latter's decision.<sup>289</sup> While such dual roles are not proscribed by public policy in the realm of private agreement, it was determined that there should be no hint of overlap between mediation under Center auspices and the judicial function. In this spirit, communications between the Center and the court were formally limited.<sup>290</sup> Moreover, judicial law clerks trained as mediators are assigned only to small claims, or to circuit court cases referred by judges other than the one to whom they are assigned.

Ethical rules for judges, lawyers, and arbitrators do not address the role of the mediator,<sup>291</sup> and although the American Bar Association has proposed standards of practice, there is no generally recognized set of ethical guidelines for mediators.<sup>292</sup> The Center is currently formulating ethical guidelines for its mediators.

#### *D. The Role of Attorneys*

Although Center Guidelines contemplate that attorneys may be present in mediation,<sup>293</sup> the Center encourages parties to play the primary role, explaining the issues to the mediator and actively participating in the resolution of the dispute.<sup>294</sup> Attorneys, if present, are generally expected to play the secondary role of observer and counselor.<sup>295</sup>

This is not to say that attorneys do not fulfill important functions before and during mediation.<sup>296</sup> As advisers, they often have much to

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<sup>289</sup> See Menkel-Meadow, *supra* note 1, at 32-33, 43; Note, *supra* note 73, at 1098.

<sup>290</sup> See MEDIATION STANDARDS, *supra* note 94, § 9.4 ("Mediators should not make recommendations regarding the substance or recommended outcome of a case to the court.").

<sup>291</sup> Lawyers who serve as mediators may have additional ethical obligations regarding past or future legal representation of the parties. See Willrich, *supra* note 286, at 1376. There should, however, be no prohibition on attorneys acting as mediators.

<sup>292</sup> See Larson & Hansen, *supra* note 235, at 16.

<sup>293</sup> See GUIDELINES, *supra* note 232, § III.

<sup>294</sup> *Id.* § VI.

<sup>295</sup> See Mastrofski, *supra* note 236, at 22 (discussing the role of attorneys in custody mediation). A number of sources offer helpful guidelines for this new advocacy role. See, e.g., Fisher, *supra* note 125, at 61-64; Jeffrey G. Kichaven & Vicki Stone, *Preparing for Mediation*, 18 LITIG., Fall 1991, at 40, 41-42; Park et al., *supra* note 81, at 638-41.

<sup>296</sup> See McEwen, *supra* note 65, at 87 (reporting research that reveals significant role of attorneys in divorce mediation). The National Standards for Court-Connected Mediation call upon courts and mediators to cooperate with the bar in educating attorneys regarding their roles in mediation.



do with creating in their clients a positive or negative attitude toward mediation.<sup>297</sup> They must prepare their client for the process, and, where necessary, serve the speaker's role in mediation.<sup>298</sup>

Far from being "rashly aggressive [types] who litigate every case with disregard for the broader, long-term interests of the client,"<sup>299</sup> attorneys frequently are supportive of the mediation process.<sup>300</sup> Increasingly, referrals to the Center are from local lawyers who see no need to wait for court-mandated mediation.

Attorneys often welcome mediation as an opportunity to force clients to face hard facts and acknowledge the weaknesses of the case.<sup>301</sup> Even if no agreement results, the process may also provide attorneys with important information—not necessarily admissible evidence, but a better sense of the issues in dispute, the opponent's positions, and the client's real needs.<sup>302</sup>

If mediation succeeds, great dividends may be reaped by the attorney. In one recent case, a local lawyer was representing an out-of-town client for the first time. Soon after pleadings were filed, he advised his client to agree to submit the dispute to the Mediation Center. Shortly after, the case was resolved in mediation. The satisfied client thereupon informed his lawyer that, having produced such satisfactory results so quickly, he would thenceforth receive all of the client's business.

At the same time, mediation is not universally appreciated. To some, it represents a challenge to the adversary culture,<sup>303</sup> relegating advocacy to second-class status and not only letting nonlawyers into the system, but placing them in key roles.<sup>304</sup> Some, accustomed to negotiating on behalf of their clients, fear a loss of control of the process. Attorneys' egos and attorneys' betterment become tacit issues, especially when an attorney's fee is contingent on the final outcome.<sup>305</sup>

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MEDIATION STANDARDS, *supra* note 94, § 10.3.

<sup>297</sup> See Mastrofski, *supra* note 236, at 24-25. The National Standards for Court-Connected Mediation call upon courts to "encourage attorneys to advise their clients on the advantages, disadvantages, and strategies for using mediation." MEDIATION STANDARDS, *supra* note 94, § 10.1.

<sup>298</sup> See Singer et al., *supra* note 119, at 290.

<sup>299</sup> Willinch, *supra* note 286, at 1375.

<sup>300</sup> See Mastrofski, *supra* note 236, at 22 (noting a 1986 survey of attorneys that indicates strong motivations to reinforce court-based custody mediation). A recent A.B.A.-sponsored survey of construction attorneys revealed overwhelming rejection of the notion that proposing mediation is interpreted as a sign of weakness. See Stipanowich & Henderson, *Mediation and Minutrial of Construction Disputes*, *supra* note 2.

<sup>301</sup> See Alfin, *supra* note 112, at 62; Mastrofski, *supra* note 236, at 24.

<sup>302</sup> See Mastrofski, *supra* note 236, at 26-27.

<sup>303</sup> See, e.g., McEwen, *supra* note 65, at 80.

<sup>304</sup> See, e.g., Mastrofski, *supra* note 236, at 24 (discussing concerns of domestic attorneys regarding custody mediation).

<sup>305</sup> One circuit court judge observed that "[l]ongtime practitioners of the law may have some

An abiding concern is that attorneys and parties will use mediation strictly as a device for discovery, or for purposes of delay. The use of mediation for discovery, which at least one survey suggests is exaggerated,<sup>306</sup> may be redressed to some degree by the mediator's supervision of discussions and by skillful use of the caucus. And while identifying recalcitrant parties seeking merely to delay trial is a difficult task, a clue is provided where a party is absent, and only his or her attorney is present at the mediation conference. Unless otherwise agreed, parties cannot and must not be permitted to send their attorney to mediation on their behalf. Pending amendments to the local circuit court mediation rule make this abundantly clear.<sup>307</sup>

#### IV. MEDIATOR QUALIFICATIONS AND TRAINING

Our lengthy discussion regarding the necessary qualifications of mediators mirrored national debate on the subject.<sup>308</sup> While adhering in some other respects to the Florida model, we generally avoided that program's experiential or educational requirements.<sup>309</sup>

Although the Center Board initially adopted recommendations calling for mediators of circuit court-referred cases to be attorneys, or other mediators acceptable to the parties, we have come to recognize that academic qualifications in related fields are no guarantee of success as a mediator.<sup>310</sup> As former SPIDR president George Nicolau recently noted, echoing statistics developed by SPIDR, there is "a large body of experience clearly demonstrating that advanced degrees or legal training

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reluctance to conform their practice to a method that allows the parties to make their feelings about the case known to the other side or to speak openly about one's theory of the case in order to arrive at a compromise." Commending the concept of mediation as a "reasonable alternative to the emotionally and financially draining ordeal of trial by jury," she admonished local attorneys to mediate in good faith—or risk imposition of sanctions. Hon. Rebecca M. Overstreet, *A View from the Bench: Mediation Center—Attitude Adjustment*, FAYETTE CTY BAR ASS'N BAR NEWS (May-June 1993) 26.

With time, however, more and more attorneys are coming to understand and appreciate the significant role played by the Mediation Center in dispute resolution. On April 30, 1993, eleven months after the Center began accepting cases, the Fayette County Bar Association conferred its Law Day Award upon the Center. See *infra* note 338.

<sup>306</sup> See Stipanowich & Henderson, *Settling Construction Disputes by Mediation, Mini-Trial and Other Processes—The ABA Forum Survey*, *supra* note 2, at 9.

<sup>307</sup> See Revised Rule 10, *supra* note 206, C.4.

<sup>308</sup> See Alfim, *supra* note 112, at 48-49.

<sup>309</sup> See *id.* at 49 n.8 (discussing Florida's system).

<sup>310</sup> See Singer et al., *supra* note 119, at 291.

were not appropriate criteria of competency,<sup>311</sup> and that legal training was not a necessary requisite.<sup>312</sup>

In practice, the policy of using co-mediators has proven to be a satisfactory way of addressing parties' concerns regarding appropriate qualifications. Advocates who are concerned about nonlawyers participating in dispute resolution may be less inclined to object if any mediator who is not an attorney is teamed with a mediator who is.

Center mediators come from all walks of life. Although most are attorneys, trainees have included social workers, educators, contractors, architects, psychologists, health care professionals and administrators, appraisers, full-time volunteers, and selected law and university students. In addition, many judges and court personnel have participated in the training as a way of better understanding the mediation process.

The Center has had no difficulty in attracting large numbers of volunteers to the program from all parts of the community. Trainees have been selected with the goals of securing the broadest possible representation of different sectors of the community, and of addressing the most pressing needs of the circuit court, such as domestic and personal injury cases.

Lawyer participation has been enhanced by the perception that mediation training makes better lawyers,<sup>313</sup> and by Kentucky Supreme Court Chief Justice Stephens's recent declaration that service as a mediator is an appropriate (and low risk) means of fulfilling pro bono obligations.<sup>314</sup> Mediator training also qualifies for continuing legal education credit. Thus far, more than 100 persons have received training through the Center. Many have also received advanced training in domestic relations mediation.

All Center mediators are required to take training in mediation procedures, including monitored skills training. Recently, this training was expanded from two-and-one-half days to four. Domestic mediators are

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<sup>311</sup> Nicolau, *supra* note 185, at 19 (recommending mediator certification based on performance rather than educational or professional background).

<sup>312</sup> Barbara Filner, Director of Training for the San Diego Mediation Center, observed that community mediators are experts in the mediation process, but not necessarily in the subject area of the dispute. They are often more effective mediators than attorneys or retired judges because they are not seduced by their own knowledge into becoming advice dispensers or dealmakers. . . In order to mediate, one schooled in advocacy must unlearn or let go of what may be "best" for the parties or what may be the legal rights of the parties.

Filner, *supra* note 201, at 17. Edith Primm of the Justice Center of Atlanta concurs wholeheartedly. Interview with Edith Primm, *supra* note 148. For a general discussion of how mandatory mediation programs can maintain mediators, see Note, *supra* note 73, at 1100-01 & nn.106-08.

<sup>313</sup> In some cases, the author and others have observed, experience as a mediator also proves more fulfilling than advocacy. At least one of our practitioner/volunteers has already forsaken trial practice to mediate full time.

<sup>314</sup> Open Letter from Chief Justice Robert Stephens (Feb. 28, 1992) (on file with author).

required to participate in a further training course emphasizing the particular issues and concerns arising in divorce and child custody cases.<sup>315</sup>

From the beginning, the Center has benefited from the advice and guidance of some of the nation's leading experts on mediation. Our mediator training programs were no exception.

The initial orientation for Center mediators was conducted by Dr. Joseph Stulberg and a team of experienced trainers prior to the opening of the Center. The presentation was a variant on the program developed by Dr. Stulberg for the Florida Circuit Court Mediation Program, and emphasized roleplaying exercises. Further training in Center policies and procedures was conducted on a subsequent weekend.

Shortly thereafter, a second cadre of mediators was trained by Sharon Press, Director of the Florida Dispute Resolution Center, and Karen Zerhusen, a professional mediator, adjunct law professor, and adviser to the Center. Over time, efforts have been directed at improving our capability to be self-sufficient in the training of mediators. We do, however, continue to rely in part on outside professional assistance.

A valuable innovation by the Center's recruitment and training arm is the practice of holding periodic continuing education programs for volunteer mediators. The sessions permit mediators to be made aware of helpful strategies and techniques and, more importantly, to raise questions and share concerns arising from their experiences.

An important source of information regarding our strengths and weaknesses is the evaluations that are routinely completed by all participants at the conclusion of each mediation. Center staff closely monitor these results.<sup>316</sup>

## V. SMALL CLAIMS MEDIATION

Small claims mediation has been successfully employed in a variety of settings, often using volunteer mediators. An example is Florida's

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<sup>315</sup> See Paquin, *supra* note 287, at 1143.

<sup>316</sup> Currently, we fall short of the San Diego Mediation Center, which requires "a year of apprenticeship, ongoing supervision, and follow-up on every mediation." See Filner, *supra* note 201, at 18. Recently, however, the Center's Executive Committee and staff elected to initiate a "mentorship program." Under this approach, each trainee will be required to observe two mediations after training and prior to mediating, and will then be paired with an experienced "mentor" mediator for three co-mediations. At the conclusion of the third mediation, the mentor will prepare a written evaluation of the new mediator.

program, which dates from the first "wave" of court-annexed mediation reform in that state.<sup>317</sup> In Maine, small claims mediation was the subject of intensive, empirical study.<sup>318</sup> The success of these projects recommended small claims as an early focus of the Mediation Center efforts.

The small claims court of Fayette district court has jurisdiction over civil disputes involving \$1,500 or less.<sup>319</sup> Small claims cases are heard every day of the week beginning in late morning; hearings are usually concluded by noon. District court judges are assigned small claims duty on a rotating basis. This abbreviated process begins when a plaintiff files a claim with the district court clerk, who notifies the defendant and sets the case for trial. Court sessions begin with the calling of the docket; in many cases, the absence of one or both parties dictates a default judgment or dismissal. Where both parties are present, the judge typically encourages the parties to step into the hall to discuss the possibility of settlement. If no settlement is reached, the case is heard by the judge; a decision usually is rendered on the spot. Of course, the threat of impending adjudication motivates many parties to settle prior to the hearing.

The rationale for mediation of small claims is in many respects the same as that offered in larger cases: more flexible results, party participation in decision making, and preserved relationships. On the other hand, mediation offers no respite from extended trial process in this setting, which is itself an innovation to shorten the path to justice. To the contrary, introducing an additional procedural element without sacrificing the speed and efficiency of abbreviated process is the special challenge of small claims mediation.

After consultation with the district court panel, it was agreed that mediation would be conducted in court on the day of the hearing. Observations of court claims proceedings made it clear that even if mediators were assigned no more than one or two cases each, they would have limited time to facilitate discussions. In order to reduce time pressures, the docket call was moved forward an hour, from 10:30 a.m. to 9:30 a.m., thus extending the time before trial. Where possible, mediators are limited to one or two cases.<sup>320</sup>

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<sup>317</sup> See Alfim, *supra* note 112, at 50. The first focus of these "citizen dispute settlement" programs was minor criminal cases, like the night mediation program in our own district court; later, some of the CDS programs began to address small civil claims. *Id.*

<sup>318</sup> See McEwen & Mauman, *supra* note 82. This study was revisited in Craig A. McEwen & Richard J. Mauman, *Coercion and Consent: A Tale of Two Court Reforms*, 10 LAW & POL'Y 3 (1988).

<sup>319</sup> See KY. REV. STAT. ANN. § 29A.230 (Miche 1988).

<sup>320</sup> There are exceptions, however. The record may be five mediations in one day, four of which

Another concern involved integration of mediation into past judicial routine. Consistent with past practice, some judges sent the parties to the hallway to discuss settlement; if they were unable to reach an agreement by themselves, they were directed to the mediator. This had two consequences: mediators had less time to work with the parties, and the parties, having hardened in their positions, were less inclined to settle. As a result, this practice has been abandoned by some judges; cases are referred directly to mediation at the time of docket call.

A final issue concerned the setting of mediation. Space is at a premium in district court, and mediation sessions are often conducted in a small room adjoining the courtroom—a space mediators have described as “stark,” “clinical,” and even “terrible.”<sup>321</sup> Seating options are limited, and interruptions frequent. In other cases, mediation is conducted in the hallway outside the courtroom. Unfortunately, these problems remain.<sup>322</sup>

Although small claims mediation involves time constraints that are unknown in the typical Center mediation, statistics for the first seven months of the program reflect a settlement rate of fifty-nine percent.<sup>323</sup>

## VI. FUNDING & SUPPORT

### A. *The Costs of Running a Community Mediation Center*

Funding is the central problem for programs like the Mediation Center of Kentucky.<sup>324</sup> Even an all-volunteer program entails certain inevitable expenses, including the cost of training and insuring mediators, staffing and administration, and physical plant expenses.

At the core of any program such as ours is a cadre of well-trained volunteers. Although some mediators will continue to work with the Center over time, natural attrition will require new mediators to be trained at regular intervals.

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were successful.

<sup>321</sup> See Hall, *supra* note 260 (manuscript at 14).

<sup>322</sup> Efforts to correct this situation are underway. See Mediation Center of Kentucky, Inc., Procedures for Small Claims Mediation (Tentative Draft). These appear to be common problems. See Davis, *supra* note 93, at 308 (discussing mediation of small claims in Massachusetts).

<sup>323</sup> In the interest of assisting small claims court mediators in making the most of their abbreviated sessions, an experienced small claims mediator recently prepared a set of guidelines for the Center. Among his “tips and techniques” briefly explain the consequences of a failure to settle, such as the wage garnishment which may follow upon a failure to pay a plaintiff’s judgment; and “[e]ncourage communication by writing each party’s address and phone number on the settlement agreement so flexibility is possible if a payment is late or not made.” MARK BRENGELMAN, TOP TEN SMALL CLAIMS COURT TIPS AND TECHNIQUES (May, 1993).

<sup>324</sup> See, e.g., Davis, *supra* note 93, at 309.

In the interest of ensuring the best possible start, we sought out nationally recognized experts for initial orientation and training sessions. Even though some of our teachers graciously volunteered their time, the total cost of training our initial corps of mediators ran into the thousands of dollars. Although we intend to become self-sufficient in this regard, and have taken major steps toward developing and presenting our own basic and domestic mediator training programs, it will be essential to continue to allocate some funds for training purposes.

The Center is also committed to a program of continuing education for our mediators. Thus far, however, these programs, which consist of presentations by professional mediators, psychologists, and others, discussions of common problems, or roleplaying exercises, have been conducted without cost to the Center.

Any thought that a program of our scope could be administered by volunteers was laid to rest in the early days and weeks of the program's existence. The burden of developing and refining Center policies and procedures, including a workable case filing system, requires considerable effort. In addition, there are administrative questions that must be attended to on a daily basis (including troubleshooting the inevitable problems that arise in dealing with complex interpersonal relationships). Finally, the director faces a not inconsiderable public relations task, and, consistent with the Center's broader mission, the obligation to explore and address the many and varied needs of the community and region for mediation services.

Although it was important that the director have mediation training and an appreciation of its advantages and limitations, other individual characteristics were just as important: administrative ability, public relations skills, and, if possible, a good relationship with the bench and bar. We were fortunate to find an interested and energetic individual with these qualifications.

To accomplish all of the assigned tasks, the director must be able to delegate much of the daily work of the Center to others, including case intake and scheduling (a very time-consuming function), meeting parties and attorneys, dealing with phone inquiries, and clerical tasks. In the early going, all of these jobs were performed by volunteers. It was clear, however, that even the brightest and most committed volunteer labor was unable to perform adequately without continuous supervision. In order to free the Center director from this onerous supervisory obligation, it was necessary to hire an office manager/case administrator. The addition of

this individual has dramatically improved the ability of the Center to accomplish its various missions.

In addition to salary and benefits, it is important to provide ongoing training for staff, particularly if part of their function is to train other mediators. Related costs include advanced mediation and negotiation seminars, and membership and participation in the Society of Professionals in Dispute Resolution ("SPIDR").

One beauty of mediation is its adaptability to different surroundings; all that is needed is an acceptable meeting room. A court-connected program, however, should be located in close proximity to the courthouse in a location that is generally accessible to its users. The setting should be a neutral one offering privacy and a modicum of comfort to participants. If multiple mediations are to occur simultaneously, several conference rooms may be needed.

The Mediation Center located a suitable space within a block of the courthouse—the former site of law offices. Although satisfactory for most purposes, these rooms have occasionally proven too small for mediation of multiparty disputes; in such cases conference rooms in nearby law firms have been utilized. Although entrance steps present a potential obstacle to disabled persons, arrangements may be made to mediate in the courthouse, which is fully wheelchair accessible.

Aside from the foregoing, insurance premiums represent the largest annual expense of the Center. These include property insurance, general liability insurance, and professional liability insurance for mediators and others.

While professional mediator liability is more of a specter than a substantial possibility, no mediation program can afford to operate without errors and omissions insurance covering officers, directors, and volunteers. Investigations revealed only one United States company offering professional liability insurance for mediation services.<sup>325</sup>

A more likely eventuality is accidental injury. Mediators and directors who serve without expectation of pay may receive affordable accident and personal liability insurance and excess automobile liability protection through the Kentucky State Department of Social Services.

The most significant protection, however, may be statutory in nature. Under Kentucky law, uncompensated directors, officers, and volunteers of tax exempt, nonprofit organizations are immune from civil liability for

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<sup>325</sup> Coverage is limited to members of SPIDR, or volunteer organizations headed by members of SPIDR.



damage or injury caused by good faith acts or omissions within the scope of their official functions or duties.<sup>326</sup>

Printing and copying expenses also require a substantial outlay by the Center. Center paperwork includes a daily spate of letters, intake forms, evaluations, and court reports.

In the interest of facilitating scheduling and other communications, multiple phone lines are a necessity. A facsimile machine is highly desirable.

### *B. Potential Sources of Funding*

Our early research raised doubts that the Center would ever be able to sustain itself on fees for case administration and consulting. Our primary model, the Atlanta Justice Center, charges no administrative fee to mediating parties, and receives less than a third of its budget from consulting and training for other programs.<sup>327</sup> On the other hand, the Center for Mediation of Disputes in Cincinnati<sup>328</sup> now charges hourly mediation fees, but still depends to a great extent upon grants received during its first years of operation.

After much discussion, our board decided to charge a relatively nominal administrative fee for each meeting with the mediators. The fee—thirty dollars per party per session in circuit court-referred cases—was intended to be commensurate with standard judicial filing fees. The board regarded it as important to keep the direct costs of mediation as low as possible to encourage voluntary use of the process and to diminish concerns regarding the cost of court-mandated mediation. Of course, no fees are charged to those unable to pay.

Since the Center opened and more and more local attorneys have had experience with mediation at the Center, a number have voiced the opinion that Center fees should be more commensurate with the value of the services provided.<sup>329</sup> On the other hand, the board is committed to

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<sup>326</sup> See KY. REV. STAT. ANN. § 411.200 (Michie 1988). One recent federal court decision is of pertinent interest. In that case, the court immunized a state court-appointed "case evaluator" from liability for a breach of confidentiality on the grounds that court-appointed mediators, among others, act in a quasi-judicial capacity. The case did not distinguish between pure mediation and evaluation/reporting functions. *Wagshal v. Foster*, 61 U.S.L.W. 2501, 2501-02 (D. D.C. Feb. 5, 1993).

<sup>327</sup> Interview with Edith Primm, *supra* note 148.

<sup>328</sup> Now renamed the Center for Resolution of Disputes.

<sup>329</sup> When one multimillion-dollar claim was mediated to settlement by a Center volunteer, the parties felt so appreciative of the mediator's hard work that they collectively expressed the desire to reward him in some way for his efforts; instead, they were persuaded to make a joint gift to the Center in his name.

a volunteer program, and one that offers mediation at reasonable rates. As of this writing, an independent committee of the local bench and bar is conferring to consider the question and develop a proposed fee schedule. Funds are also being generated by consulting arrangements with organizations seeking mediation training or services. Thus far, however, the Center has not developed a uniform policy for such arrangements.

In the 1970s, Law Enforcement Assistance Association ("LEAA") funds were the lifeblood of many community mediation programs. When this money disappeared, programs either found other sources of funding or closed their doors. Today, some state programs are supported by state agencies; an example is the Massachusetts Department of Social Services.<sup>330</sup> The Atlanta Justice Center receives most of its funding from the governments of three counties in the Atlanta metropolitan area.<sup>331</sup>

Although the Kentucky legislature provided pilot funding for the Louisville Family Court project,<sup>332</sup> the timing of our own program made such funding impossible during the last legislative session. Particularly in light of the statewide mission of the Center, however, such appropriations may be sought in the future.

In New York, the unified court system operates the Community Dispute Resolution Center.<sup>333</sup> Florida has a nationally renowned court-annexed mediation/arbitration program; statewide administrative services are a joint function of the Florida Supreme Court and Florida State University College of Law.<sup>334</sup> An increase in court filing fees funds San Diego's mediation project.<sup>335</sup> These are but a few of the formulas for court-funded administration of court-connected mediation.

From the beginning, the courts provided substantial guidance and moral support to the Mediation Center program. When it was first proposed that pilot funding for a director might be available through the circuit court master commissioner's office, some board members were concerned that such an arrangement would compromise the board's oversight capability. Eventually, however, these doubts were overcome by the assurances of local judges, and with the court's assistance one of the Center's major financial concerns was satisfactorily addressed. The Administrative Office of the Courts ("AOC"), while not providing

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<sup>330</sup> See, Davis, *supra* note 93, at 308.

<sup>331</sup> Interview with Edith Primm, *supra* note 146.

<sup>332</sup> See Graham, *supra* note 38, at 1108.

<sup>333</sup> See Christian, *supra* note 141, at 1104; see also Davis, *supra* note 93, at 308 (discussing Massachusetts' district court mediation program).

<sup>334</sup> See Press, *supra* note 153, at 1044; see also Nicolau, *supra* note 185, at 19 (discussing Massachusetts' and New York's state-funded mediation centers).

<sup>335</sup> See Filner, *supra* note 201, at 17.

financial support, has assisted the Center in a number of ways. In addition to providing most of the office furnishings for the Center, the AOC has approved mediation training programs for continuing legal education credit, thus giving added encouragement to attorneys to volunteer as mediators.

During the past two decades private charities and foundations have provided considerable short-term funding for community mediation programs. Unfortunately, some of these organizations are no longer granting seed money to programs such as ours, and there are increasing demands on those that still do. Current grant programs are often limited to particular kinds of projects, such as programs dealing with public policy disputes.

Bar organizations often play a key role in the success or failure of ADR programs. Reflecting the growing awareness of such alternatives, the current president of the Kentucky Bar Association has made ADR a primary focus of his tenure in office,<sup>336</sup> and a committee of the bar is currently formulating recommendations for court-annexed ADR in the Commonwealth.

Meanwhile, the official reception accorded the Mediation Center of Kentucky has been increasingly enthusiastic. Center representatives have been invited to make presentations before numerous bar meetings, encouraging many attorneys and a number of law firms to pledge considerable time, energy, equipment, and financial resources to the program.

Although financial support from bar organizations has not been great, this is largely a function of difficult economic times, tight budgets, and the multitude of competing demands confronting official funding sources. The Kentucky Interest on Lawyer's Trust Accounts ("IOLTA") Fund, for example, must also consider the significant needs of regional pro bono programs. If mediation can be shown to be an effective means of resolving many of the cases that now overburden other bar-sponsored programs, the mediation alternative may be viewed in a different light.<sup>337</sup>

On Law Day, 1993, the Mediation Center of Kentucky was recognized by the Fayette County Bar Association for its significant

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<sup>336</sup> See Ellen Razor, *Campbell Assumes Leadership of Bar Association*, 3 KY. BAR NEWS, Summer 1992, at 1, 2.

<sup>337</sup> As Linda Singer notes, "the new forms of dispute resolution hold the potential for resolving significant numbers of individual cases which are now litigated by legal services attorneys, thus freeing legal services resources for litigation with wider potential impact." Singer, *supra* note 72, at 569.

contributions to the legal system and community.<sup>338</sup> This strong accolade hopefully augurs well for future support by the organized bar.

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<sup>338</sup> The Bar Association Resolution states as follows:

LAW DAY 1993

RESOLUTION

FAYETTE COUNTY BAR ASSOCIATION, INC.

WHEREAS, the Mediation Center of Kentucky, Inc. was organized as a not-for-profit corporation after extensive study and work by a task force containing representatives of the legal system, the business community, Urban County Government, the school system, social service agencies and the Lexington community at large; and

WHEREAS, the Mediation Center of Kentucky, Inc., has undertaken to provide free or affordable methods of dispute resolution outside the Court system for all manner of disputes, through the training and services of volunteer mediators; and

WHEREAS, the Mediation Center of Kentucky, Inc. has been a community effort, assisted by charitable contributions and gifts in kind from law firms, businesses and individuals; and

WHEREAS, the Mediation Center of Kentucky, Inc. has already provided free mediation training to over ninety (90) lawyers and non-lawyers, and is now beginning to offer advanced domestic relations mediation training as well; and

WHEREAS, the Mediation Center of Kentucky, Inc. has afforded a valuable opportunity for interaction between the legal community and non-lawyers; and

WHEREAS, the Mediation Center of Kentucky, Inc. already has demonstrated its value to the Court system and litigants in Fayette County by the mediation of many pending lawsuits from Fayette Circuit Court as well as small claims matters from Fayette District Court, with a remarkable settlement rate; and

WHEREAS, the Mediation Center of Kentucky, Inc. has provided business and professional groups such as the Lexington Board of Realtors with an alternative dispute mechanism which will reduce the number of lawsuits resulting from disputes between business or professional people and their customers or clients; and

WHEREAS, the Mediation Center of Kentucky, Inc. already has provided, and promises to continue to be, a great example of the value of alternative dispute resolution programs and cooperative efforts between the Bench and Bar and the local community; and

WHEREAS, the Mediation Center of Kentucky, Inc. has served to promote the speedy administration of justice, both directly and indirectly, but settling cases in litigation and by settling matters so as to avoid litigation, thereby allowing Judges to devote more time and attention to cases which cannot be settled by mediation; and

WHEREAS, the Mediation Center of Kentucky, Inc. has provided a valuable way for attorneys to advance their professional skills and to fulfill their *pro bono* obligations to the community;

NOW THEREFORE, BE IT RESOLVED, that the Board of Directors of the Fayette County Bar Association, Inc. heartily commend the Mediation Center of Kentucky, Inc., its organizers, volunteer mediations and all other participants for their collective contributions to the legal system and a better community in Lexington, Fayette County, Kentucky.

Done this 30th day of April, 1993, LAW DAY.

ATTEST:

John G. Irvin  
SECRETARY

James H. Frazier III  
PRESIDENT

On the national scene, business and industry have discovered the value of informal dispute resolution, as reflected in the growing number of companies and individuals who have signed the Center for Public Resources pledge to seek out-of-court solutions.<sup>339</sup> In particular, many insurance companies are encouraging the use of mediation to settle claims.<sup>340</sup>

A number of local businesses have made substantial contributions to the Center. Some of these gifts were prompted by satisfaction with a recently completed mediation. Often, contributions are in-kind, like the equipment donated by a local computer manufacturer.

## VII. EVALUATION OF MEDIATION EFFORTS

How does one evaluate the success of a single mediation, let alone an entire program? This question has stumped researchers in several disciplines. The most obvious measure is whether or not agreement is achieved,<sup>341</sup> particularly when the program tends to address controversies that are the subject of court actions.

On the other hand, settlement rates are only one part of the picture.<sup>342</sup> There are a number of other ways in which to assess

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<sup>339</sup> See, e.g., *Major Food Companies Agree to CPR Plan to Try ADR for 90 Days Before Filing Lawsuits*, 11 ALTERNATIVES TO THE HIGH COST OF LITIG. 23 (1993).

<sup>340</sup> See, e.g., *Mediation, Arbitration Venues Offer Corporate Litigants Justice-in-Time*, 9 BUS. J. OF MILWAUKEE INC., July 4, 1992, at 6.

<sup>341</sup> See JOSEPH STULBERG, *TAKING CHARGE, MANAGING CONFLICT* 124 (1987) ("The ultimate criterion of effectiveness or success of mediation is whether or not the intervention achieves [settlement]."); Thomas A. Kochan & Todd Jick, *The Public Sector Mediation Process: A Theory and Empirical Examination*, 22 J. CONFLICT RESOL. 209, 211-12 (1978) ("[M]easure[s] of mediation effectiveness [include] the proportion of issues that are resolved during the mediation process [and] the degree of movement toward agreement by the parties during the mediation intervention"); Jamace A. Roehl & Royer F. Cook, *Issues in Mediation: Rhetoric and Reality Revisited*, 41 J. SOC. ISSUES 161, 162 (1985) ("Mediation should be judged on how well it resolves disputes between conflicting parties.").

Lim and Carnevale, in the most rigorous study of mediation outcomes conducted to date, suggest that outcomes fall into one of three categories: (1) general settlement, (2) mediator outcomes, and (3) improved relationship. Rodney G. Lim & Peter J. D. Carnevale, *Contingencies in the Mediation of Disputes*, 58 J. PERs. & SOC. PSYCHOL. 259, 267 (1990). Subcategories of general settlement include "overall success," "number of issues reduced," and "lasting agreement reached." *Id.* at 267; see also Susan S. Sibley & Sally E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL'Y, Jan. 1986, at 7, 19 ("The purpose of mediation is to reach settlement.").

<sup>342</sup> For instance, the recent National Standards for Court-Connected Programs provide that "[s]ettlement rates should not be the sole criterion for mediation program funding, mediator advancement, or program evaluation." *MEDIATION STANDARDS*, *supra* note 94, § 11.4.

mediation, in the discrete case and systemically.<sup>343</sup> Has mediation improved channels of communication between the parties, or strengthened the relation? Has the process helped to clarify party views or interests? Has it identified realistic options, or helped the parties reach general or specific understandings? How effective was the mediator (or, in our typical case, the mediation team)? If an agreement was reached, is it perceived as "fair"? Is it likely to endure? What remedies or undertakings were achieved, and how do they differ from judicial remedies?<sup>344</sup> What was the relative cost of achieving that result? If mediation failed, what contributed to that failure? Finally, are the parties satisfied with the mediation process and the result, and would they mediate again or recommend it to others? Answers to all of these questions are important in understanding how well mediation is meeting the needs of parties and the expectations of program adherents.

#### A. Evaluation Procedure

From the inception of the pilot program, the Mediation Center board believed that the process should contain a mechanism for evaluating each mediation, and for a systematic analysis of the program. Such a mechanism would enable quick review of the experience of individual mediators, of the results of mediation in various categories of dispute, and of participant attitudes and perceptions.

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<sup>343</sup> See Kubasek & Silverman, *supra* note 76, at 538. In a comprehensive review of the literature, Professors Kressel and Pruitt list six general categories of mediation outcome: (1) user satisfaction, (2) rates of compliance, (3) rates of settlement, (4) nature of agreements, (5) efficiency, and (6) improvement in the postdispute climate. Kenneth Kressel & Dean G. Pruitt, *Conclusion: A Research Perspective on the Mediation of Social Conflict*, in *MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTIONS* 395-400 (Kressel et al. eds., 1989); see also Kenneth Kressel & Dean G. Pruitt, *Themes in the Mediation of Social Conflict*, 41 J. Soc. ISSUES 179, 184 (1985) ("One problem with the evidence [favoring mediation] is the paucity of studies and the narrow range of types of mediation investigated to date.").

Another illustration underscores the range and significance of possible measures. In an incisive examination of 130 public sector labor disputes, Kochan and Jick relied on four measures of effectiveness: (1) settlement (versus no settlement), (2) percent of issues resolved, (3) movement on the issues, and (4) "holding back the concessions." Kochan & Jick, *supra* note 341, at 212. When examining the influence of several variables on these outcomes, the researchers observed that the effectiveness and desirability of a particular mediator's behavior depends on which definition of mediation outcome is used. See *id.* at 229. For example, "aggressiveness of the mediator is more important in reducing the number of issues [as a measure of outcome] than in affecting whether a final settlement is achieved [as another measure of outcome]." *Id.*

<sup>344</sup> See Singer et al., *supra* note 119, at 291.

Because it was determined that different lists of questions should be given to mediators, parties, and parties' attorneys, three separate forms were developed. Each instrument sought feedback regarding the participant's perceptions of the mediation process, the mediator, and results.

The forms, which incorporate features of a number of other evaluation instruments, were designed to be completed at the conclusion of mediation. To permit quick responses, no open-ended questions were included (other than a request for comments at the end of the form). Center Guidelines call for the evaluations to be collected by Center staff or volunteer intake personnel so that the evaluations would not be seen by the mediators.<sup>345</sup>

Because the Center had been in operation for only seven months at the time of this summary, and mediated relatively few cases during the first weeks of its existence, the data is necessarily limited: data were prepared on the basis of 236 evaluations covering sixty-six separate case files.<sup>346</sup> Due to time limitations associated with the process, no information was solicited with respect to small claims mediation. Nor do the data reflect later settlements, which are now known to have occurred in many cases.

### *B. Settlement Rates*

Data was collected on a total of sixty-six case files representing completed mediations. Of these, twenty-one, or nearly a third, involved domestic disputes (including divorce, child support, custody, visitation, and property settlement). Another fourteen involved personal injury, professional malpractice, products liability, and other tort-related cases. The remainder involved sexual harassment (3), real estate (3), personal property (4), equine matters (1), personal employment (2), debtor/creditor relations (3), consumer protection (1), banking (1), landlord/tenant relations (1), commercial dealings (1), construction contracts (4), and various other contractual arrangements (7).

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<sup>345</sup> GUIDELINES, *supra* note 232.

<sup>346</sup> This figure, which does not include small claims disputes mediated at the district court, compares very favorably with caseload statistics from other mediation centers. See, e.g., Davis, *supra* note 93, at 308 (finding that the average district court program has 1.4 staff members, mediates 117 cases). Although a summary of the entire first year of Center operation is not complete, it is known that the Center accepted almost 240 cases (exclusive of small claim) during that period.

Of the cases for which data was collected, thirty-two (48%) resulted in a complete resolution of all mediated issues. Another seven (11%) ended in partial settlement. Twenty-seven mediations (40.9%) concluded without settlement.<sup>347</sup>

Interestingly, the rate of settlement in domestic cases was much higher than the norm: twelve of twenty-one (57.2%) resulted in full settlement, and another five (23.8%) ended in partial settlement. Thus, some consensus was reached in four of five domestic mediations.

### C. Effectiveness of the Process

Mediators, parties, and participating attorneys were all asked to evaluate the effectiveness of mediation in achieving the following goals:

- (1) improving communication between the parties;
- (2) clarifying viewpoints, interests, and positions;
- (3) identifying realistic options and/or alternatives;
- (4) reaching general understandings and agreements; and
- (5) reaching specific agreements.

Respondents were asked to rate effectiveness on a five-point scale, with a rating of five indicating "high effectiveness" and a rating of one indicating "ineffectiveness." A rating of three, therefore, reflects moderate effectiveness.

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<sup>347</sup> The "full or partial settlement" rate of 59% may be compared to statistics from other mediation processes and programs. See, e.g., Research and Development Division, *Settlement Week 1989—The District of Columbia Superior Court*, in SETTLEMENT WEEK: A PRACTICAL MANUAL FOR RESOLVING CASES THROUGH MEDIATION, at B-1 (Harold Paddock, ed. 1990) (reporting only 33% of mediated cases settled in full; 42% of contract cases settled); see also Jessica Pearson, *An Evaluation of Alternatives to Court Adjudication*, 7 JUST. SYS. J. 420, 430 (1982) ("More typically mediation programs report agreement in 40-65% of the cases mediated"); McEwen & Maiman, *supra* note 133, at 249 ("66.1% of the mediation cases ended with agreement"). In a construction mediation survey, the author found that 59.1% of mediations resulted in full settlement and 7.9% resulted in partial settlement. See Stipanowich & Henderson, *Settling Construction Disputes by Mediation, Mini-Trial and Other Processes—The ABA Forum Survey*, *supra* note 2, at 9. For other area specific results, see Jean M. Hiltrop, *Factors Associated with Successful Labor Mediation*, in MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTIONS 241, 245 (Kressel et al. eds., 1989) (finding 61% of labor mediations were settled in full); Jean M. Hiltrop, *Mediator Behavior and the Settlement of Collective Bargaining Disputes in Britain*, 41 J. SOC. ISSUES 83, 85 (1985) (57% of labor mediations were settled in full); see also Jeanne M. Brett & Stephen B. Goldberg, *Grievance Mediation in the Coal Industry: A Field Experiment*, 37 INDUS. & LAB. REL. REV. 49, 55 (1983) (finding 73% of coal union mediations settled); John W. Hinchey, *Yes, We Do Need Special Rules for Complex Construction Cases!*, 11 CONSTR. LAW., Aug. 1991, at 1, 30 (finding success rates for complex construction mediation at 70-90%).



TABLE 1: PERCEPTIONS OF EFFECTIVENESS OF MEDIATION

ATTRIBUTE	PARTICIPANT		
	Attorneys	Mediators	Parties
<i>Improving Communications</i>			
Overall	3.45*	3.79	3.50
Settled in Mediation**	3.86	4.07	3.96
Not Settled in Mediation	2.96	3.41	2.91
<i>Clarifying Viewpoints, Interests</i>			
Overall	3.99	4.16	3.89
Settled in Mediation**	4.22	4.38	4.24
Not Settled in Mediation	3.73	3.91	3.38
<i>Identifying Options &amp; Alternatives</i>			
Overall	3.83	4.01	3.73
Settled in Mediation**	4.31	4.31	4.15
Not Settled in Mediation	3.15	3.59	3.09
<i>Reaching General Understanding</i>			
Overall	3.68	3.62	3.53
Settled in Mediation**	4.22	4.26	4.17
Not Settled in Mediation	2.96	2.81	2.56
<i>Reaching Specific Agreements</i>			
Overall	3.55	3.51	3.35
Settled in Mediation**	4.42	4.50	4.17
Not Settled in Mediation	2.29	2.00	2.03

## NOTES:

\* A "1" represents "Highly Ineffective" and a "5" represents "Highly Effective."

\*\* Partial settlement is not reported.

Ratings by all groups were generally positive: that is, they reflected perceptions of moderate to high effectiveness in most categories. Perhaps not surprisingly, mediators tended to view the process (and their own contributions) more affirmatively than parties or attorneys.<sup>348</sup> However, the collective response of mediating parties and counsel usually indicated that, more often than not, some good had come of the process. Although

<sup>348</sup> Data compiled by Jim Alfim during interviews with Florida mediators and attorneys found that the mediators routinely had higher estimates of case settlement than attorneys. See Alfim, *supra* note 112, at 61.

mediation was viewed most positively by those who reached agreement, advantages were seen even in cases where no written agreement resulted.

When asked to rate the effectiveness of mediation in improving communications among disputants, the average rating for all responding mediating parties was 3.50 (above moderate effectiveness); in cases where full settlement resulted, the average was higher. Even in cases where no settlement was reached, the group as a whole found mediation to be moderately effective in improving communications. Participating attorneys' perceptions were not significantly different.

Interestingly, both groups rated mediation less helpful to communications in the domestic arena than in other categories of cases. Although the closed nature of the questionnaire did not permit explanations, the lower ratings may reflect the relative intensity of feeling that inhibits communications between former couples.<sup>349</sup>

Regardless of the disposition of disputed issues, mediating parties and attorneys both found mediation to be a relatively effective means of clarifying viewpoints, interests, and positions of the parties. The average rating of mediating parties for fully settled cases was 4.24; for unsettled cases, 3.38. Attorneys were even more positive regarding this aspect of mediation, particularly where no agreement was reached. Since attorneys are likely to find such clarification helpful when future counseling is necessary, this advantage may be a significant one.

A purported advantage of mediation over so-called "predictive" ADR procedures such as court-annexed arbitration is the ability of the process to facilitate identification of alternative ways of addressing the issues at hand, rather than simply identifying a dollar figure for settlement. Party and attorney evaluations suggest that mediation is generally an effective means of identifying realistic options or alternatives for the parties.

It is possible that even in situations where mediation does not result in a binding agreement between the parties, more general understanding may emerge, thus laying the foundation for further consensus. Party and attorney responses, while mixed, indicate that mediation was often effective in reaching general understandings and agreements even where no final resolution resulted.

As one might expect, mediation was deemed very effective at assisting the parties in reaching specific agreements in those cases where full settlement was effectuated by the process, and relatively ineffective where no written settlement was achieved.

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<sup>349</sup> This may also indicate that mediation is not particularly suited to domestic relations. See Woods, *supra* note 130, at 435.

### D. Effectiveness of Mediators

A number of questions targeted participants' perceptions of the mediators' role in the mediation process.<sup>350</sup> Evaluating parties and attorneys were asked to rate the effectiveness of mediators in a variety of categories, such as ability to explain the mediation process, fairness and impartiality, understanding of the issues, listening ability, ability to ask relevant and insightful questions, consideration of the parties' needs and goals, ability to keep the discussion focused, and willingness to allow the parties to express their point of view. Again a five-point scale was employed, with five denoting "high effectiveness" and one denoting "ineffectiveness."

TABLE 2: PERCEPTIONS OF MEDIATOR EFFECTIVENESS

DIMENSION OF EFFECTIVENESS	PARTICIPANT		
	Attorneys	Mediators	Parties
<i>Explained Process of Mediation</i>			
Overall	4.64*	3.93	4.68
Settled in Mediation**	4.64	3.81	4.79
Not Settled in Mediation	4.74	4.15	4.53
<i>Fair and Impartial</i>			
Overall	4.66	4.34	4.60
Settled in Mediation**	4.61	4.40	4.66
Not Settled in Mediation	4.78	4.34	4.50
<i>Understood Issues Involved</i>			
Overall	4.57	4.50	4.28
Settled in Mediation**	4.61	4.50	4.47
Not Settled in Mediation	4.59	4.53	4.03
<i>Good Listening Skills</i>			
Overall	4.74	4.33	4.58
Settled in Mediation**	4.78	4.33	4.70
Not Settled in Mediation	4.78	4.34	4.41
<i>Asked Relevant &amp; Insightful Questions</i>			
Overall	4.57	3.91	4.30
Settled in Mediation**	4.53	3.92	4.53
Not Settled in Mediation	4.63	3.90	4.00
<i>Reduced Tensions Between the Parties</i>			
Overall	3.96	3.73	3.85
Settled in Mediation**	4.03	3.86	4.19
Not Settled in Mediation	3.89	3.66	3.42

<sup>350</sup> See Table 2. Unfortunately, the current questionnaire is not structured in such a way as to permit a separate evaluation of each co-mediator, but requires a collective evaluation.

DIMENSION OF EFFECTIVENESS	PARTICIPANT		
	Attorneys	Mediators	Parties
<i>Developed Helpful Ideas</i>			
Overall	4.06	3.81	3.91
Settled in Mediation**	4.25	4.00	4.30
Not Settled in Mediation	3.75	3.52	3.34
<i>Considerate of Parties Needs &amp; Goals</i>			
Overall	4.46	4.23	4.22
Settled in Mediation**	4.39	4.40	4.47
Not Settled in Mediation	4.59	4.09	3.84
<i>Kept Discussion Directed at Main Issues</i>			
Overall	4.46	4.06	4.25
Settled in Mediation**	4.36	4.00	4.47
Not Settled in Mediation	4.67	4.16	3.91
<i>Mediator Allowed Parties to Express Views</i>			
Overall	4.69	4.50	4.53
Settled in Mediation**	4.69	4.53	4.62
Not Settled in Mediation	4.78	4.56	4.67

## NOTES:

\* A "1" represents "Highly Ineffective" and a "5" represents "Highly Effective."

\*\* Partial settlement is not reported.

Mediators generally received high marks from both groups. This was true even in circumstances where no settlement was reached.

Although the primary intent of the questions was to provide a basis for evaluating mediation teams, certain responses also have implications for the resolution of outstanding issues or for the parties' ongoing relationship. For example, when asked to rate the mediators' effectiveness at reducing tensions between the parties, parties' responses tended to be fairly positive even in the absence of settlement, as were the responses of participating attorneys. Mediators were also deemed effective at coming up with helpful ideas.

### *E. Perceptions of Agreement*

In cases where mediation resulted in a specific agreement, participants were asked to rate the effectiveness of mediation in producing a "fair"

agreement on the same five-point scale. All groups responded favorably, although mediators and attorneys were much more positive than parties in their appraisal.<sup>351</sup> The difference reflects the broader range of responses by parties—apparently indicating that some reached terms with which they were not entirely happy.<sup>352</sup>

When asked a similar question regarding the effectiveness of the process at producing a "durable" agreement (that is, one that both parties will keep), all groups were apparently very confident that their mediated agreements would stand the test of time.<sup>353</sup>

TABLE 3: SETTLEMENT CHARACTERISTICS

SETTLEMENT CHARACTERISTIC	PARTICIPANT		
	Attorneys	Mediators	Parties
<i>Settlement Was Fair and Just</i>	4.18*	4.46	3.51
<i>The Parties Will Live Up to the Terms</i>	4.38	4.29	4.30

NOTES:

\* A "1" represents "Highly Ineffective" and a "5" represents "Highly Effective."

\*\* Partial settlement is not reported.

### F Results of the Mediated Agreement

One of the theoretical advantages of retaining control over dispute resolution is that parties can resolve the issues that separate them and structure agreements that go well beyond the permissible bounds of court decrees. A preliminary survey of agreements achieved through mediation at the Center reflect this relative flexibility.

<sup>351</sup> One possible explanation for this difference in perceptions is that attorneys are more aware of the range of possible results at trial and therefore, tend to accept a wider range of mediated results.

<sup>352</sup> See Table 3.

<sup>353</sup> No attempt has been made to ascertain rate of compliance with these mediated agreements. Some researchers have explored this aspect of mediation outcome, however. See, e.g., Craig A. McEwen & Richard J. Maiman, *The Relative Significance of Disputing Forum and Dispute Characteristics for Outcome and Compliance*, 20 LAW & SOC. REV. 439 (1986) (small claims mediation); Neil Vidmar, *An Assessment of Mediation in a Small Claims Court*, 41 J. SOC. ISSUES 127 (1985) (same). Such research focuses on whether the defendant had paid some, all or none of the settlement after some specified period of time. In practice, such information is often difficult to procure given the confidentiality of the post-mediation result.

Agreements between divorced couples incorporated a wide range of specific terms affecting child custody and visitation, including detailed visitation schedules, notice requirements for visitation requests or changes of plan, holiday arrangements, conditions on visitation relating to abstention from destructive behavior (drinking, driving without a license, etc.), place and time of transition, and apportionment of transportation costs between parents' residences. Related arrangements include agreements to participate in or bear the cost of family therapy, apportionment of educational costs, and agreement to share authority regarding child care arrangements.

Domestic property settlements detailed, among other things, schedules of payment and, in one case, an agreement to sell jointly held real property under certain conditions.

Structured payments were also a common feature of mediated agreements outside the domestic area. In addition to specifying dates and, in some cases, times of payment, some agreements stated the manner of payment, the place of tender, interest rates, and waiver provisions. One agreement required a party to issue a promissory note by a particular date.

Other agreements established specific requirements for future performance under contracts for sale and service agreements, including details and standards of performance, applicable guarantees, payment terms and liquidated damages. Still other contracts provided for the return of specific personal property, the removal of signs from real property and the extension of insurance coverage for a certain period. One of the most novel arrangements involved a party's promise to publish an apology in the local newspaper.

Parties also incorporated a number of valuable non-substantive provisions. These included agreements to keep the mediated terms confidential, to submit existing disputes to arbitration or to further mediation, to mediate future disputes, or to have their representatives meet to clarify points of agreement and disagreement.

A recent experience of the author reflects the flexibility of mediated settlement. The case involved a contractor's claims against a school district for sums withheld as liquidated damages for delays to completion of a building renovation; the district, meanwhile, was left with an incomplete building.<sup>34</sup> Mediated negotiations reopened communications

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<sup>34</sup> The retained sums and remaining work were not of significant magnitude to make litigation (or even moderate discovery) cost effective for either party.

between the parties, resolved differences over liability for delays, secured final payment for the contractor, and resulted in a specific agreement for completion of the work to the satisfaction of the owner.

### *G. Effects of Mediation and Reasons for Mediated Agreement*

In examining the cost and time savings realized through mediation, it is tempting to draw comparisons with the expense of trial. This, however, depends upon the assumption—incorrect in many cases—that disputes invariably reach the trial phase. Many of the disputes submitted to mediation may be settled without that process.<sup>355</sup> In an effort to determine what percentage of successfully mediated cases might have otherwise ended in trial, participating attorneys and mediators were polled. Three-fourths of the responding mediators were convinced that their case would have gone to trial but for mediation. More significantly, *four-fifths of the responding attorneys reached the same conclusion.* This suggests either that respondents were overly pessimistic about the chances of pre-trial settlement, or that the cases that were directed to mediation were truly tougher to settle. The latter is made more likely by the fact that about sixty-six percent of the cases reviewed were submitted to mediation around the time of the pre-trial conference or on the eve of trial.<sup>356</sup>

Where mediation ended in total or partial agreement, attorneys were asked to estimate the amount of court time that would have been required to adjudicate the issues settled. Around sixty-six percent estimated that up to a day of court time was saved; another twenty-one percent estimated savings of two days, and the remainder, three or more trial days.<sup>357</sup>

Even where pre-trial settlement is possible, of course, mediation may still provide relative advantages over unassisted negotiation—such as earlier settlement and a better, more satisfying result, not to mention a positive impact on ongoing relationships between parties. On the other hand, relative cost-savings may be reduced when mediation occurs late in the pre-trial process, as is often the case in our program.

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<sup>355</sup> Jim Alfin has suggested, therefore, that as a general principle mediation must be evaluated on its superiority to unassisted negotiation. See Alfin, *supra* note 112, at 61.

<sup>356</sup> Around 18% of the disputes were mediated "soon after the answer was filed or before substantial discovery." Another 16% were mediated "after discovery was completed or substantially completed."

<sup>357</sup> Although not included in the early figures, at least one mediated settlement avoided what was expected to be many weeks of trial.

*H. Reasons for Failure to Settle, Satisfaction with the Mediation Process, and Improving the Evaluation Process*

In cases where mediation did not result in a complete agreement, participants were asked to choose one or more reasons for lack of agreement. Responding parties tended to assign blame to the distance between the parties rather than to a lack of preparedness on the part of the parties or the ineffectiveness of the mediators. While in some cases they suspected an unwillingness to mediate on the part of their adversary, no party admitted such reluctance on their own part.<sup>358</sup> Attorney views were markedly similar.<sup>359</sup>

The evaluations of responding parties reflect relative satisfaction with mediation, although attorneys tended to be even more sanguine about the process.<sup>360</sup> While satisfaction was much higher among those who achieved full settlement, the collective response was positive even in cases where no settlement resulted.

The first systemic analysis of the program made it obvious that the task of performing data entry and multivariate analysis for an increasing volume of cases probably requires a more sustained effort than one can expect from volunteers. Therefore, the Mediation Center currently is

358

**PARTYS' PERCEPTIONS OF  
REASONS FOR NONSETTLEMENT**

<u>REASON FOR NONSETTLEMENT</u>	<u>NUMBER OF RESPONSES</u>
Parties too far apart	20
Disagreement over facts	20
Disputed liability	13
The other party did not want to mediate	8
Inadequate settlement authority	5
Lack of information	3
Ineffective mediator	3
Party or counsel unprepared	0
I did not want to mediate	0

359

**ATTORNEYS' PERCEPTIONS OF  
REASONS FOR NONSETTLEMENT**

<u>REASON FOR NONSETTLEMENT</u>	<u>NUMBER OF RESPONSES</u>
Parties too far apart	25
Disputed liability	13
Disagreement over facts	10
The other party did not want to mediate	6
Inadequate settlement authority	2
Lack of information	2
Ineffective mediator	1
Party or counsel unprepared	1
I did not want to mediate	0

<sup>360</sup> Typically, user satisfaction with mediation is very high, even for those who fail to reach a settlement. See, e.g., Kressel & Pruitt, *supra* note 343, at 395-96.



working with the University of Kentucky to obtain grant funding for future program analysis. This may make possible regular monitoring by the Center and court regarding the program's efforts, and permit constructive decision making regarding Center policies and procedures.<sup>361</sup>

In modifying the evaluation form, it may be appropriate to include questions regarding case demographics, the amount in controversy, and the likely range of settlement. In the interest of providing constructive critiques of individual mediator performance, moreover, it may be appropriate to seek separate assessments of each co-mediator.

### VIII. THE MEDIATION CENTER REACHES OUT

In recent years many community justice centers have been moving beyond court-annexed programs and contracting to provide services to public institutions as well as private associations.<sup>362</sup> This activity mirrors, on a smaller scale, the pioneering efforts of the American Arbitration Association ("AAA"). The AAA's successful partnerships with numerous trade and industry groups (which reference AAA rules in standardized contracts) and its involvement with state regulatory programs (reflected in statutes referring disputants to AAA procedures) have reaped dividends for all parties. These relationships proved mutually beneficial since the user groups, private or public, were assured of an independent, reputable source of out-of-court dispute resolution services, and the AAA was guaranteed a steady flow of business. Among the functions fulfilled by the AAA (and a growing number of smaller, less visible organizations) are: provision of dispute resolution rules; administration of dispute processes; training and appointment procedures for neutrals; research; and community education. The Mediation Center of Kentucky fulfills similar functions on a regional basis, as a number of evolving projects attest.

The construction industry, which long ago embraced arbitration, is now exploring the advantages of mediation and a host of other non-adjudicative options.<sup>363</sup> Organizations representing the major sectors of the industry, such as the Associated General Contractors, the Association of Building Contractors, the American Institute of Architects, the National Society of Professional Engineers, and the Construction Specifications

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<sup>361</sup> See *MEDIATION STANDARDS*, *supra* note 94, § 16.0 (calling for periodic evaluation of court-connected programs, and adequate funding to accomplish this task).

<sup>362</sup> See Andrew Thomas, *Can Community Justice Centers Be Successful Without Court Sponsorship?*, *FORUM*, Winter 1992, at 24.

<sup>363</sup> See generally Stipanowich & Henderson, *Beyond Arbitration*, *supra* note 2.

Institute, are actively advocating the use of mediation. A new interdisciplinary organization, the Construction Industry Dispute Avoidance and Resolution Task Force ("DART"), exists to coordinate national and regional efforts in this direction.

Now, with the assistance of DART, the Mediation Center of Kentucky and the leading industry associations and government agencies in Kentucky are cooperating in the establishment of a statewide construction mediation program. A new section of the Kentucky Bar Association, the Section on Construction and Public Contract Law, has made the project its initial focus. The intent is to develop specific rules and procedures for mediating construction-related claims and controversies and to organize and train a multidisciplinary cadre of mediators from throughout the region, who would be available to facilitate settlement in any part of the region. The program would be the first of its kind in the country. The Center will administer the program and train mediators.

The national and regional emphasis on mediation and party-oriented dispute processes in contractual relationships reaches beyond the construction industry. For example, the National Association of Realtors now encourages mediation as an efficient, relatively low-cost procedure that invites participation by parties and "contribute[s] to long-term goodwill between brokers, their clients and customers."<sup>364</sup>

In late 1992, the Mediation Center and the Lexington Board of Realtors arranged for the Center to administer the Board's new program for mediation of disputes involving home buyers and sellers, the first of its kind in the Commonwealth. The Center's Guidelines and Procedures are now incorporated in the standard residential purchase agreement recommended by the Board, making mediation the first step in a private, informal dispute resolution process. Center representatives introduced local realtors to the program, and other individuals with pertinent backgrounds received mediation training in anticipation of private referrals through the program.<sup>365</sup>

Mediation offers special advantages in conflicts within churches and religious organizations. "Concern for the dignity of the person and the protection of personal rights and freedoms" of church members led the

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<sup>364</sup> See NATIONAL ASSOCIATION OF REALTORS, DISPUTE RESOLUTION SYSTEM: GUIDELINES FOR MEMBER BOARDS 2 (March 1990).

<sup>365</sup> According to Elaine Hangis, Executive Vice President of the Board of Realtors, the directors "enthusiastically, wholeheartedly approved the . . . proposal [submitted by the Center at the Board's request]." She reported that one of the directors had used the Mediation Center and called it "the best thing to happen in Lexington!" Mediation Center of Kentucky, Inc., Newsletter, *supra* note 275, at 2.

Lexington Catholic Diocese to develop the Conciliation and Arbitration Process.<sup>366</sup> The process was intended to provide a private recourse for those aggrieved by administrative decisions within the Church—first through conciliation [mediation], and then, if necessary, through binding arbitration.<sup>367</sup> Fourteen conciliators and seven arbitrators, all members of the Church, volunteered for the program. Representatives of the Mediation Center of Kentucky conducted separate training programs for both groups of volunteers.

Mediation is also becoming an important informal dispute resolution device in statutorily mandated medical malpractice programs.<sup>368</sup> At this writing, it appears that mediation has found a place in the comprehensive health care reform package proposed by Kentucky's current governor.<sup>369</sup> The Mediation Center of Kentucky was consulted by various involved parties regarding proposed statutory language, and may someday be called upon to play a role in the implementation of such a program.

Despite its special relationship with the Fayette County courts, the Mediation Center of Kentucky was intended to be a resource for mediation programs throughout the Commonwealth. This commitment has led to involvement in a number of private and public initiatives. It also is hoped that, building upon the Center's example and with Center advice and consultation, mediation programs will spring up throughout the Commonwealth. In rural areas, county bar associations may be able to cooperate with local courts to develop voluntary programs modeled on our own.

From the beginning, the founders of the Mediation Center were committed to making mediation services available to segments of the population that might not be able to afford legal services. The intent was not to substitute mediation for legal advice and consultation,<sup>370</sup> but to make certain that the underprivileged were not denied the benefits of this alternative just because they were underrepresented in the civil courts. In this endeavor, we have met with limited success.

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<sup>366</sup> CATHOLIC DIOCESE OF LEXINGTON, CONCILIATION/ARBITRATION PROCESS 1 (1992).

<sup>367</sup> *Id.* at 2.

<sup>368</sup> A number of malpractice arbitration provisions have been amended or repealed.

<sup>369</sup> See *Kentucky Health Care Reform Executive Summary* (Office of the Governor) Mar. 1, 1993, at 2. Reflecting the continuing confusion regarding ADR terminology, the executive summary provided for disputes to "be heard first by mediation panels before being filed in court (unless all parties involved waive mediation)" (emphasis added). *Id.* The implication of mediators hearing cases is that they judge the case. As we have seen, nothing could be further from the truth.

<sup>370</sup> Some have raised concerns that mediation and other informal dispute resolution procedures would represent a form of "second class justice" foisted off on the poor and underprivileged. See ROGERS & McEWEN, *supra* note 71, § 4.3.

Although the Center is increasingly receiving cases through private referral, the bulk of the Center's business remains circuit court-referred cases. While the Center charges no administrative fee to parties with court-appointed counsel and others who demonstrate an inability to pay, most mediating parties do not fall in these categories.

In an effort to reach out to those who do, the Center has always maintained close ties with the local legal services and pro bono programs—both of whose directors sit on the Center's Board of Directors. A problem, however, is that unless a case is court-referred, the consensus of the disputants is required to mediate the case. This has remained a substantial obstacle to referrals from these other programs.<sup>371</sup>

In addition, Center representatives have approached local government agencies and the local police department, both of which have programs aimed at the minority communities and other needs for low cost mediation services. The Center has handled a number of cases from these sources, including landlord/tenant controversies and employment matters, but has not yet received broad-based referrals.

#### IX. EDUCATIONAL EFFORTS

A 1992 survey of adult Americans by the National Institute for Dispute Resolution determined that four out of five respondents, when informed regarding dispute resolution options, would prefer these options to litigation.<sup>372</sup> Clearly, understanding the relative costs, advantages and limitations of mediation, adjudication, and other processes is essential to making the right choices in dispute resolution.

Another role of the Mediation Center of Kentucky is to educate the bar and the general public regarding the possibilities of mediation.<sup>373</sup> This commitment extends not only to speeches and presentations before community groups and organizations, but to expanded emphasis on informal dispute resolution in educational programs at all levels—from elementary school through law school. The ultimate goal is nothing less

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<sup>371</sup> According to the Director of Central Kentucky Legal Services, the problem is compounded by a shortage of intake personnel to process cases, and the shortage of lawyers to represent indigent clients in mediation. Letter from Jerry H. Smith to author, May 7, 1993 (on file with author).

<sup>372</sup> See NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, DISPUTE RESOLUTION QUANTITATIVE BENCHMARK SURVEY 16 (June 22, 1992).

<sup>373</sup> Recently developed National Standards for Court-Connected Mediation Programs call upon the courts, working with bar and professional mediation organizations, to inform "the public, the bar, judges, and court personnel regarding the mediation process" MEDIATION STANDARDS, *supra* note 94, § 3.1.

than a change in the adversarial mindset in legal education and popular culture.

### *A. Reforming the Culture of the Law School*

A deliberate effort must be made to reform legal education to put the role of adjudication into its proper, limited perspective. While knowledge of the forms and procedures of the courthouse is vital to most lawyers, the atmosphere of the courtroom pervades most substantive courses. The very foundation of law school training, the case method, conveys the message that problems inevitably are solved by trial (or in many cases, through the appellate process). Many students are left with the perception that the primary role of attorney is that of adversary, and that legal norms and "adjudicated truths" are the only acceptable standards—as evidenced by one member of my ADR class who questioned how one could ever be sure of getting the "right result" without litigating.

The thoroughness with which most law students are girded for trial is rivaled by the paucity of training in negotiation skills and techniques. This is a sad irony, since many more cases will be negotiated to settlement than will ever see the inside of a courtroom. If law students ever were adequately trained in these "traditional lawyering skills," which is doubtful, it is clear that their preparation is even less satisfactory for a world in which there are plenty of alternatives to litigation and unassisted negotiation.<sup>374</sup>

The Quiet Revolution has begun in the law schools,<sup>375</sup> both here and abroad.<sup>376</sup> A growing number of programs feature classes on alternative dispute resolution, including advanced skills-based courses. Some schools integrate ADR concepts into "mainstream" substantive courses.<sup>377</sup> A few are experimenting with clinical programs offering mediation services.

Instituting a dispute resolution program in the University of Kentucky's small, rather traditional law school required careful management of resources. Given the alternative of skills-oriented training for a limited few or a survey of emerging approaches for a greater number, the latter choice was inevitable: broad-based changes can only

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<sup>374</sup> See Hilary Astor & Christine Chinkin, *Teaching Dispute Resolution: A Reflection and Analysis*, 2 LEGAL EDUC. REV. 1, 7 (1990) (noting the "constant evolution of dispute resolution processes" in Australia).

<sup>375</sup> See Ann Malaspina, *Mediators in the Making*, STUDENT LAW., Dec. 1992, at 29; Ken Myers, *ADR in the Classroom: The Move from More Adversarial Lawyering*, NAT'L L.J., June 1, 1992, at 40.

<sup>376</sup> See, e.g., Astor & Chinkin, *supra* note 374, at 3 n.5.

<sup>377</sup> See *id.* at 2.

occur if substantial numbers of students are exposed to new perceptions. The survey approach introduces students to various perspectives on ADR, acquaints them with a spectrum of conceptual tools for avoiding and resolving disputes, and confronts some of the issues raised by public or private adoption of ADR. At the same time, the global approach permits only a broad brush treatment of many questions, and leaves little room for either hands-on experience or meaningful skills training.<sup>378</sup>

However, the presence of a community program such as the Mediation Center dramatically expands the educational possibilities without incurring significant cost or risk to the university. The Center's growing experience base is a valuable source for hypothetical discourse. Trained mediators observe and evaluate roleplaying exercises and lend a realistic perspective to classroom discussions of problems encountered in the field, as does an expanding network of experts providing guidance and training for Center mediators (such as a psychologist who addressed the use of body language and other subtle signals in mediation). ADR students and student volunteers also perform case intake, clerical duties, and committee tasks, and undertake background research for Center projects and procedures. Hopefully, student participation in the life of the Center serves to inculcate an appreciation of the pro bono obligation of all practitioners.<sup>379</sup>

In the eternal debate over clinical education and skills training,<sup>380</sup> an ongoing, independent enterprise such as the Mediation Center offers a novel solution to traditional concerns. It does not depend upon the school for essential funding. With some faculty supervision, it provides a natural vehicle for giving students practical training in dispute mediation. And as long as confidentiality is maintained, it entails fewer risks than traditional areas of clinical education, such as legal advocacy or counseling.

Our community mediation program is pivotal to a proposed new course in mediation encompassing classroom discussion, mediation skills training, and community education. As interns in the Center, a limited number of

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<sup>378</sup> See *id.* at 5. A curious aspect of the survey is the schizophrenic nature of the course, which presents difficulties for some students. Mediation, the major focus of the first half of the course, is: (1) informal and loosely structured, (2) the subject of relatively few published decisions, but a fertile field for policy discussion, and (3) lends itself to roleplaying exercises. Arbitration, the leading subject in the latter half of the course, is: (1) increasingly formalized and structured on multiple levels (a sometimes daunting combination of governing federal and state statutes, standard procedural rules and contract provisions), (2) the subject of a vast and growing body of federal and state decisional law, and (3) more difficult to adapt to classroom roleplaying (although not impossible, given careful planning).

<sup>379</sup> This spirit was reflected in many individual contributions as well as the collective enterprise of the University of Kentucky College of Law Student Bar Association, whose Race Judicata (road race) raised almost \$1400 for the Center this year.

<sup>380</sup> See Astor & Chinkin, *supra* note 374, at 6.

students (from the colleges of law and social work) will observe actual cases, mediate small claims, and eventually co-mediate selected larger cases. These field experiences will serve as a counterpoint to readings on significant concerns such as the impact of mediation on violent offenders and their victims.<sup>381</sup> With this background, it is hoped, law students and other students will be in a position to share their perspectives and experiences with younger students.

### *B. Mediation Training in the Primary and Secondary Schools*

A new understanding of our approach to conflict requires not only a revamping of legal education, but also a deliberate effort in the public schools. The Drug Awareness Resistance Education ("DARE") program has had a significant impact on awareness of the risks of drug use among youth;<sup>382</sup> there is no reason why similar efforts could not create widespread appreciation of nonjudicial options for managing conflict.

Indeed, ADR programs have sprung up in primary and secondary schools throughout the nation.<sup>383</sup> In the last two years, the Fayette County Schools have implemented pilot programs in conflict management at several area schools. Ultimately, a program in conflict management will assist staffs of elementary, middle and high schools to develop a plan to train teachers in managing conflicts and to infuse dispute resolution skills in the existing curriculum. Additionally, selected students will receive advanced training in resolving student conflicts. These students will then work as mediators within the school.

A harbinger of the future is the current mediation training program jointly sponsored by Henry Clay High School, the Fayette County School System, the Mediation Center, and the University of Kentucky College of Law. The training program is part of a larger skills training effort aimed at the de facto leaders in the high school student body. In two days of intensive discussion and roleplaying at the College of Law, twenty-four students learned the basic skills enabling them to mediate student conflicts within their school. Law students participated in an instructive mock mediation exercise that was used during the session, and joined with Mediation Center volunteers in supervising and observing roleplaying.

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<sup>381</sup> See *id.* at 20-21.

<sup>382</sup> See, e.g., Melame Markely, *H.P.D. Chief to Expand Drug Education Program to All Elementary Schools*, HOUSTON CHRON., Mar. 5, 1993, at A30.

<sup>383</sup> See generally THE COMMUNITY BOARD PROGRAM, INC., CONFLICT RESOLUTION: A SECONDARY SCHOOL CURRICULUM (1987) [Lynn Simandle]; R.E. Mild, *An Analysis of Conflict Management in Grades 3 Through 8* (1990).

## X. THE FUTURE(S) OF THE MEDIATING COMMUNITY

The Quiet Revolution is not a passing fad, but a wave of change that will profoundly alter the way we view conflict avoidance and resolution. Mediation is likely to assume a primary role in whatever combination of public process and private enterprise that comprises the system of justice and conflict resolution. Ideally, interdisciplinary volunteer efforts, like the Mediation Center of Kentucky, should continue to play a significant role.

### A. *Changes in the Community and the Legal Profession*

Frustration with the limitations of the old ways of doing things, the "opening up" of the justice system through community projects and public programs such as the Mediation Center, and universal instruction regarding mediation and other informal approaches ultimately will cause the general public to become more discriminating regarding the choices they make and the counsel they receive in dealing with personal or institutional conflict.

For boardroom counselors and litigators alike, providing the choice between unassisted negotiation and litigation will no longer be sufficient. Accordingly, attorneys should be in a position to inform and educate their clients regarding the arguments for and against using mediation and other dispute resolution tools. There is already some indication as to what the future may hold. For instance, standards of conduct of the Academy of Matrimonial Lawyers now require members to "be knowledgeable about alternative ways to resolve matrimonial disputes";<sup>384</sup> such standards should be de rigueur for all advocates. Likewise, a growing number of attorneys have voluntarily taken a pledge to use out-of-court techniques whenever possible.<sup>385</sup>

As more attorneys experience the positive attributes of mediation and realize that their client's interest should be determinative, fewer attorneys will avoid mediation for fear of losing personal control or losing business. Failing to take advantage of mediation or any other option that holds the potential for satisfactorily resolving a client's problem is comparable to a doctor prescribing surgery when less drastic and costly remedies are at hand. Both actions are wrong.

It seems clear that, far from excluding lawyers, there are opportunities to integrate attorneys in mediation and other problem-solving approaches.

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<sup>384</sup> Singer et al., *supra* note 119, at 289 (quoting AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, BOUNDS OF ADVOCACY Std. 1.4 (1991)).

<sup>385</sup> See Ronie Sherman, *Big Firms Join ADR Sign-athon*, NAT'L L.J., Oct. 28, 1991, at 2.



As Craig McEwen notes, the future holds a "more complex professional role for lawyers"<sup>386</sup>—a role that must balance problem solving and advocacy. The future will undoubtedly see new options for professional practitioners, with attorneys serving in new roles—facilitating relationships instead of representing parties and advocating cases. They will not have this field to themselves, however.

### *B. Rise of the Private Entrepreneurs*

Already, the ADR marketplace has begun to produce a wide variety of private alternatives, from nonprofit organizations to entrepreneurial ventures in all shapes and sizes. Nationwide franchises, regional programs, and local mom-and-pop operations offer a smorgasbord of alternatives, including arbitration, private judging (arbitration with a retired judge at the helm), minitrial, neutral fact finding, and mediation.<sup>387</sup> Many of these private providers are seeking partnerships with courts<sup>388</sup> and some are organized on the national level.<sup>389</sup>

To these must be added a burgeoning public service sector, reflected in regional and local programs such as the Mediation Center of Kentucky. Meanwhile the venerable American Arbitration Association, long the "I.B.M. of dispute resolution," is working to stay on the cutting edge of innovation,<sup>390</sup> along with a growing list of national, nonprofit acronyms—CPR, NIDR, SPIDR, and others.<sup>391</sup>

Since Frank Sander proposed a wholesale restructuring of the civil justice system two decades ago,<sup>392</sup> the system has responded with a

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<sup>386</sup> McEwen, *supra* note 65, at 87.

<sup>387</sup> See N. Aches, *Rent-A-Judge*, AM. CITY & COUNTY, Oct. 1990, at 59.

<sup>388</sup> See Daniel Wise, *Court Will Assign Cases to ADR Firms*, N.Y. L.J., Aug. 20, 1992, at 1 (describing offers by private providers to do a small number of "free" mediations for New York City courts).

<sup>389</sup> See William G. Hartgering, *Building a Private Justice System*, 13 BARRISTER, Fall 1986, at 25. As more and more would-be providers come out of the woodwork, legitimate questions are being raised regarding appropriate standards of performance. Some would go so far as to require professional certification of mediators, although this idea is hotly debated. See Stephen Goldberg *et al.*, *ADR Problems and Prospects: Looking to the Future*, 69 JUDICATURE 291 (Feb.-Mar. 1986); see also Michele Galen & Alice Cuneo, *Have Business Card, Will Mediate*, BUS. WEEK 125 (Dec. 7, 1992) (discussing problems of unregulated mediators and arbitrators).

<sup>390</sup> See, e.g., Thomas, *supra* note 362, at 24-26 (discussing AAA sponsorship of the Center for Dispute Settlement, Inc., in Rochester, N.Y.).

<sup>391</sup> These acronyms stand for, respectively, Center for Public Resources, Inc., National Institute for Dispute Resolution, and Society of Professionals for Dispute Resolution. See Ellen J. Pollock, *Arbitrators Hear the Arguments for Mediation*, WALL ST. J. B8 (April 28, 1993) (discussing response of AAA to recent competition); *Mediation Firms After the Legal Landscape*, WALL ST. J. B1 (Mar. 22, 1993) (discussing national organizations offering mediation services).

<sup>392</sup> See Sander, *supra* note 52.

gradual crescendo of change. Within this short decade the Civil Justice Reform Act,<sup>393</sup> the Negotiated Rulemaking Act,<sup>394</sup> the Administrative Dispute Resolution Act,<sup>395</sup> and President Bush's executive order endorsing the use of ADR "to resolve claims of or against the United States or its agencies" and requiring that all counsel representing the government in civil cases be trained in dispute resolution techniques,<sup>396</sup> have stimulated a frenzy of activity in the federal courts and administrative system.

Two years ago, well over a thousand state courts had dispute resolution programs of one form or another.<sup>397</sup> According to a 1988 study, "state court administrators are in a position to generate state-level support for new program ideas," either in the form of financial aid, coordination or administrative services, or educational efforts.<sup>398</sup>

Our court system, like others, is evolving to address community conflict more comprehensively and with greater flexibility.<sup>399</sup> The Mediation Center is the latest of a host of other reforms that have creatively expanded the capability of the justice system to address a wide variety of problems: small claims court, misdemeanor mediation in district court, and the divorced parent education program. Although some of these goals are accomplished by internal mechanisms (such as small claims), others depend upon extra-judicial sources, such as expert evaluators for child custody disputes<sup>400</sup> and Center mediators.

Frank Sander has questioned why, in funding a system of public justice, the adversary system should receive all of the funding.<sup>401</sup> Seed money for programs like the Mediation Center often saves other court resources, improves the quality of many results, stimulates individual volunteer activity, and opens up the process of dispute resolution to nonlawyers and, more importantly, to the parties.<sup>402</sup>

<sup>393</sup> Civil Justice Reform Act of 1990, 28 U.S.C. §§ 478, 479; 5 U.S.C. §§ 581-90 (Supp. 1992); see Don J. DeBenedictis, *An Experiment in Reform*, A.B.A. J., Aug. 1992, at 16.

<sup>394</sup> Negotiated Rulemaking Act, 5 U.S.C. §§ 581-590 (Supp. 1992); see Singer et al., *supra* note 4, at 130 (discussing the NRA).

<sup>395</sup> Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (codified in 5 U.S.C. § 571) (Supp. 1992).

<sup>396</sup> Exec. Order No. 12,778, 56 Fed. Reg. 5595 (Oct. 23, 1991) (effective Jan. 21, 1992).

<sup>397</sup> See *supra* note 24.

<sup>398</sup> See Keilitz et al., *supra* note 33, at app. A.

<sup>399</sup> See William Grady, *In Courtroom of the Future, Justice May Be Behind Door No. 3*, CHL TRIB., Aug. 30, 1992, at 4.

<sup>400</sup> See Mastrofski, *supra* note 236, at 21.

<sup>401</sup> See Frank A. Sander, *Paying for ADR*, A.B.A. J., Feb. 1992, at 105.

<sup>402</sup> The recent National Standards for Court-Connected Mediation call for mediation services to "be available on the same basis as are other services of the court." MEDIATION STANDARDS, *supra* note 94, § 1.1.

*C. Change and the Mediation Center of Kentucky: Thinking Flexibly*

For all who have taken part in its birth and growth, the Mediation Center of Kentucky has been a joyful and creative exercise.<sup>403</sup> Thus far, we have built a stable, independent program that continues to stretch in many directions, while receiving assistance from the courts. We have successfully charted the narrow course between the perilous rocks of unfunded impotency on the one hand, and the deadening fate of bureaucraticization and formalization on the other.<sup>404</sup>

The future brings more questions. What will be the role of the Mediation Center in an era of many emerging choices for mediation and dispute resolution? How do we balance our mission as a court-connected program with the needs of specific sectors of the community, including those with least access to the justice system?<sup>405</sup> How can we best accomplish our role as a model and resource for programs in smaller communities? How should we interrelate with existing programs, public and private, with similar ends? Should we mediate only, or should we expand the scope of our services to include binding arbitration and other approaches? What combination of private and public subsidies and fee generation will provide stability in the long term? Finally, how do we continue to learn from our experiences, improve our procedures, and get the best out of our mediators, without dampening the spirit of creativity that now animates our program? We do not yet know, but we intend to find out.

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<sup>403</sup> At the time I resolved to go to law school, I was studying architecture abroad. When I informed my British instructor of my intention, he stood aghast. When I then explained that I planned to be a "creative lawyer," he laughed. "That," he chortled, "is an oxymoron." Until my involvement with the Mediation Center, I was becoming more and more convinced that he was right.

<sup>404</sup> See Davis, *supra* note 93, at 309.

<sup>405</sup> See, e.g., Thomas, *supra* note 362, at 24.

**APPENDIX A-1**  
**RULE 10. MEDIATION PILOT PROJECT**

**A. Cases for Mediation**

Any judge may at the completion of the pleadings, or at any other time prior to trial, refer to mediation any civil case except habeas corpus cases, election contests, appeals or actions for injunctive relief.

**B. Referral to Mediation**

1. The Judge may, by appropriate entry, refer the case to mediation with or without the consent of the parties.

2. Referral of a case to mediation shall not operate as a stay of discovery proceedings unless otherwise ordered by the Court or agreed to in writing by the parties.

**C. Mediation Conferences**

1. The mediator shall direct the parties and their attorneys to attend a mediation conference(s) which may be in person or by telephone, at the mediator's discretion. Such a conference shall be conducted by the mediator to consider the possibility of settlement, the simplification of the issues and any other matters which the mediator and the parties determine may aid in the handling or the disposition of the proceedings.

2. The mediator may schedule such sessions as are necessary to complete the process and mediation shall continue until the parties have reached a settlement, until they are unwilling to proceed further, or until the mediator determines that further efforts would be futile.

3. If a party fails to appear at a duly noticed mediation conference without good cause, the Court upon motion shall impose sanctions, including an award of attorney fees and other costs against the party failing to appear. If a party to mediation is a public entity, that party shall be deemed to appear at a mediation conference by the physical presence of a representative with full authority to negotiate on behalf of the entity and to recommend settlement to the appropriate decision-making body of the entity; otherwise, unless stipulated by the parties, a party is deemed to appear at a mediation conference if the following persons are physically present:

- a) The party or a representative having full authority to settle without further consultation; and
- b) The party's counsel of record, if any; and
- c) A representative of the insurance carrier for any insured party who is not such a carrier's outside counsel and who has full authority to settle without further consultation.

4. The mediator may request that the parties bring documents or witnesses, including expert witnesses, to the sessions, but has no authority to order such production.

#### D. Confidentiality

1. Except as otherwise provided by this rule, all mediation documents and mediation communications are privileged and confidential and shall not be disclosed. They are not subject to disclosure through discovery or any other process, and are not admissible into evidence in any judicial or administrative proceeding.

2. No part of the mediation proceedings shall be considered a public record.

3. There is no privilege and no restriction on disclosure under this rule if:

- a) All parties consent in writing to disclosure;
- b) The mediation communication or mediation document gives the mediator knowledge of or reasonable cause to suspect that a child has been abused or neglected, but only to the extent and for the specific purpose the communication or document is required to be disclosed; or
- c) The mediation communications were made in furtherance of the commission of a crime or fraud or as part of a plan to commit a crime or fraud, but only to the extent and for the specific purpose the communication or document is required to be disclosed.

4. Nothing in this rule shall be construed so as to permit an individual to obtain immunity from prosecution for criminal conduct.

### E. Reporting to the Court

1. The mediator shall notify the Court promptly when a case is not accepted for mediation.

2. At any time after a case has been accepted, the mediator may refer it back to the Court for good cause, which shall be in writing.

3. If a case is settled prior to or during mediation, an attorney for one of the parties shall prepare and submit to the Court an order reflecting the fact of settlement as in any other case.

4. If some but not all of the issues in the case are settled during mediation or if agreements are reached to limit discovery or on any other matter, the parties shall submit a joint statement to the Court enumerating the issues that have been resolved and the issues that remain for trial. This statement shall be submitted within 10 days of the termination of mediation. Unsettled cases shall then be returned to the Court's active docket.

5. At the conclusion of cases accepted for mediation, the mediator will report to the Court the fact that the mediation process has ended. If the parties do not reach an agreement as to any matter as a result of mediation, the mediator shall report the lack of an agreement to the Court without comment or recommendation. With the consent of the parties the mediator's report may also identify any pending motions, outstanding legal issues, discovery process or other action by any party which, if resolved or completed, would facilitate settlement.

APPENDIX A-2  
RULE 10. MEDIATION  
~~MEDIATION PILOT PROJECT~~  
(WITH PROPOSED REVISIONS' MAY 1993)

A. Cases for Mediation

Any judge may at the completion of the pleadings or at any other time prior to trial, refer to mediation any civil case except a habeas corpus cases or election contests, ~~appeals or actions for injunctive relief.~~

B. Referral to Mediation

1. The Judge may, by appropriate ~~entry order~~, refer the case to mediation with or without the consent of the parties. Mediation shall be referred to the Mediation Center of Kentucky, Inc. for mediation in accordance with its guidelines and procedures, or to another Court-approved mediator.

2. Any party may move to enter an order disqualifying a mediator for good cause. If the Court rules that a mediator is disqualified from mediating the case, an order shall be entered setting forth the name of a qualified replacement. Nothing in this provision shall preclude mediators from disqualifying themselves or refusing any assignment. The time for mediation shall be tolled during any periods in which a motion to disqualify is pending.

2 3. Referral of a case to mediation shall not operate as a stay of discovery proceedings unless otherwise ordered by the Court or agreed to in writing by the parties.

C. Mediation Conferences

1. The parties shall contact the Mediation Center of Kentucky, Inc. (Mediation Center), or other Court-approved mediator, within five (5) days from the entry of the order to schedule a mediation conference, which shall be held within thirty (30) days from the entry of the order.

2. The mediator shall direct the parties and their attorneys to parties shall attend a mediation conference(s) which may be in person or by telephone, at the mediator's discretion. Counsel may also be present. Such a conference shall be conducted by the mediator to consider the

possibility of settlement, the simplification of the issues and any other matters which the mediator and the parties determine may aid in the handling or the disposition of the proceedings.

3 2. The mediator may schedule such sessions as are necessary to complete the process, and mediation shall continue until the parties have reached a settlement, until they are unwilling to proceed further, or until the mediator determines that further efforts would be futile.

4 3. If a party fails to appear at a duly noticed mediation conference without good cause, the Court, upon motion, shall impose sanctions, which may include~~ing~~ an award of attorney fees and other costs against the party failing to appear. If a party to mediation is a public entity, that party shall be deemed to appear at a mediation conference by the physical presence of a representative with full authority to negotiate on behalf of the entity and to recommend settlement to the appropriate decision-making body of the entity; In all other cases~~Otherwise~~, unless stipulated by the parties, a party is deemed to appear at a mediation conference if the following persons are physically present:

- a) The party or a representative (other than the party's counsel of record) having full authority to settle without further consultation; and
- ~~b) The party's counsel of record, if any; and~~
- b) e) A representative of the insurance carrier for any insured party who is not such a carrier's outside counsel and who has full authority to settle without further consultation.

The party's counsel of record, if any, may also be present.

5 4. The mediator may request that the parties bring documents or witnesses, including expert witnesses, to the sessions, but has no authority to order such production.



#### D. Confidentiality

1. Except as otherwise provided by this rule, all mediation documents and mediation communications are privileged and confidential and shall not be disclosed. They are not subject to disclosure through discovery or any other process, and are not admissible into evidence in any judicial or administrative proceeding.

2. No part of the mediation proceedings shall be considered a public record.

3. There is no privilege and no restriction on disclosure under this rule if to the extent that:

- a) All parties consent in writing to disclosure;
- b) The mediation communication or mediation document gives the mediator, or persons associated with the mediator's office, knowledge of or reasonable cause to suspect that a child or a spouse has been abused or a child has been neglected, ~~but only to the extent and for the specific purpose the communication or document is required to be disclosed;~~ or,
- c) The mediation communications were made in furtherance of the commission of a crime or fraud or as part of a plan to commit a crime or fraud; ~~but only to the extent and for the specific purpose the communication or document is required to be disclosed.~~

4. Nothing in this rule shall be construed so as to permit an individual to obtain immunity from prosecution for criminal conduct.

#### E. Reporting to the Court

1. The Mediation Center or other Court-approved mediator shall notify the Court promptly when a case is not accepted for mediation.

2. At any time after a case has been accepted, the Mediation Center or other mediator may refer it back to the Court for good cause, which shall be in writing.

3. If a case is settled prior to or during mediation, an attorney for one of the parties shall prepare and submit to the Court an order reflecting the fact of settlement as in any other case.

4. If some but not all of the issues in the case are settled during mediation or if agreements are reached to limit discovery or on any other matter, the parties shall submit a joint statement to the Court enumerating the issues that have been resolved and the issues that remain for trial. This statement shall be submitted within 10 days of the termination of mediation. ~~Unsettled cases shall then be returned to the Court's active docket.~~

5. At the conclusion of cases accepted for mediation, The Mediation Center or other mediator will report to the Court the fact that the mediation process has ended. If the parties do not reach an agreement as to any matter as a result of mediation, the Mediation Center or other mediator shall report the lack of an agreement to the Court without comment or recommendation. With the consent of the parties the mediator's report may also identify any pending motions, outstanding legal issues, discovery process or other action by any party which, if resolved or completed, would facilitate settlement.

APPENDIX B  
MEDIATION CENTER OF KENTUCKY, INC.  
AGREEMENT TO MEDIATE

This is an agreement between the Mediation Center of Kentucky, Inc., and the following Parties: \_\_\_\_\_

The Parties are submitting a dispute to mediation at the Mediation Center in accordance with the Center's Guidelines and Procedures for Mediation. The Mediation Center has assigned \_\_\_\_\_ to mediate this dispute. The Mediator(s) will control the procedural aspects of the mediation.

**Confidentiality.** The mediation process is a privileged settlement negotiation and shall be confidential. Except for reporting requirements set forth in the Center's Guidelines and Procedures, the Parties and the Mediator shall not disclose information regarding the process to third Parties, including, without limitation, settlement terms or, in the case of impasse, the reason for such impasse, unless the Parties otherwise agree. The Mediator and other agents or employees of the Mediation Center may not be subpoenaed or called to testify as a witness, consultant or expert in any pending or future action relating to the subject matter of the mediation, including those between persons not Parties to the mediation. No Party may seek to introduce, for any purpose, evidence of a statement or of conduct during mediation at any trial or hearing that may later be held between the Parties. No Party may subpoena any documents resulting from the mediation. The Mediator will not transmit information given to him/her by any Party to another Party, if requested not to do so.

**Release.** The Parties understand that the mediation services provided by the Mediation Center of Kentucky, Inc., do not include legal or financial advice. Therefore, no Party shall rely upon the Mediator or the Mediation Center of Kentucky, Inc., for such advice or representation. The Parties are encouraged to seek legal advice from an attorney and financial advice as needed by qualified professionals. No Party shall hold the Mediation Center of Kentucky, Inc., or the Mediator liable for the results of the mediation, whether or not the Parties resolve their dispute.

This agreement is signed by the Parties and the Mediation Center of Kentucky, Inc., on \_\_\_\_\_

MEDIATION CENTER OF KENTUCKY, INC.

\_\_\_\_\_  
Kathleen M. Binder, Director

\_\_\_\_\_  
Mediator

\_\_\_\_\_  
Mediator

## APPENDIX C GUIDELINES AND PROCEDURES FOR MEDIATION\*

### I. DEFINITION

Mediation is a structured problem-solving process in which a neutral, impartial third-person or persons assists the parties to the dispute to reach a voluntary agreement to resolve the dispute. The mediator facilitates the negotiations, but does not impose his or her views of what the agreement should be. The mediation process is non-binding. While participating in mediation, each party agrees to make a good faith attempt to settle the dispute through mediation, to cooperate with the mediator, and to be open, candid, and complete in his/her efforts to resolve the dispute.

### II. CONFIDENTIALITY

The mediation process will be confidential. The parties and the mediator will not disclose information regarding the process to third parties, including without limitation, settlement terms, or in the case of impasse, the reason for such impasse, unless the parties otherwise agree. The mediator may not be called to testify as a witness, consultant or expert in any pending or future action relating to the subject matter of the mediation, including those between persons not parties to the mediation. No party may seek to introduce, for any purpose, evidence of a statement or of conduct during mediation at any trial or hearing that may later be held between the parties. The mediator will not transmit information given to him/her by any party to another party, if requested not to do so.

### III. REPRESENTATION

Each party may be represented by an attorney or other representatives, provided that at least one representative of each party is authorized to negotiate a settlement of the dispute and provided that the representative participates throughout the mediation process. If attorneys and principals are participating, the mediator, after consultation with the participants, may conduct sessions with just the principals, just the attorneys, or both principals and attorneys present.

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\* In the case of a referral from the Fayette Circuit Court, these guidelines and procedures are to be read in conjunction with Rule 10 of the Local Rules of the Fayette Circuit Court.

The mediator will not provide legal advice or legal representation for any party. All parties are expected and encouraged to retain their own legal counsel and to withhold final approval of an agreement until they are advised by their counsel.

#### IV COURT PROCEEDINGS

If possible, all parties should refrain from court proceedings during the mediation process if they can do so without prejudicing their legal rights. If litigation is already pending between the parties regarding the subject matter of the mediation, the parties may agree to inform the court of the mediation process and request a stay of court proceedings. Discovery should be suspending while mediation is on-going.

#### V SUPPLEMENTAL INFORMATION; WITNESSES

At the mediator's discretion the parties may submit such material and information as is deemed necessary to familiarize the mediator with the dispute. As a rule such material shall not be presented prior to the mediation session. In the case of materials submitted before mediation, the parties should jointly agree on the material to be submitted. The materials submitted should be as brief as possible.

Since mediation is aimed as settling the case and is not an evidentiary hearing, the Center discourages the use of third party witnesses in mediation.

#### VI. ROLE OF ATTORNEYS

The role of attorneys in mediation is very different from their role in trials or other judicial procedures. While attorneys may participate in mediation (and in fact may do much to bring about a successful result), the Center's policy is to have the parties themselves play the primary role in the process. Parties will be encouraged to explain the issues to the mediator and actively participate in the resolution of the dispute.

#### VII. SETTLEMENT

Efforts to reach a settlement will continue until (a) a settlement is reached, or (b) one of the parties withdraws from the process, or (c) the mediator concludes and informs the parties that further efforts would not be useful. If a settlement is reached, the parties, or the mediator if

requested by the parties, will draft a written settlement document incorporating all settlement terms. This draft will be reviewed by the parties at the mediation conference and, if acceptable, signed. The Mediation Center provides a form for settlement agreements.

#### VIII. REPORTING TO THE COURT

At the conclusion of mediation, the mediator will report to the court the fact that the mediation process has ended. If the parties do not reach an agreement as to any matter as a result of the mediation, the mediator shall report the lack of an agreement to the court without comment or recommendation. With the consent of the parties the mediator's report may also identify any pending motions, outstanding legal issues, discovery process or other action by any party which, if resolved or completed, would facilitate settlement.

#### IX. FEES

The Center charges a minimal administrative fee for most cases submitted to mediation. Please contact the Mediation Center for further information on fees. Payment shall be made by cash, money order, or certified check made payable to the Mediation Center of Kentucky on or before the scheduled date for mediation. When paying in cash please bring the exact amount due. The Center does not keep cash on hand. As a matter of Center policy, any amount overpaid by any party will be refunded by a check mailed out within one week of overpayment.

#### X. ADDITIONAL GUIDELINES AND PROCEDURES

Additional guidelines and procedures for the mediation process may be negotiated and agreed upon by the mediator and the parties at any time during the mediation process.

**APPENDIX D-1**  
**MEDIATION CENTER OF KENTUCKY, INC.**  
**MEDIATOR'S EVALUATION OF MEDIATION**

Because we want to continue to improve our mediation program, your responses to this questionnaire are very important to us. Please take a few moments to answer these questions and return the form to us in the envelope provided.

**THE FOLLOWING SHOULD BE COMPLETED BY THE MEDIATOR:**

Mediation Case #: \_\_\_\_\_

Name(s) of Mediator(s): \_\_\_\_\_

Please circle your response(s) to the following questions.

1. Please grade the effectiveness of the mediation process in each of the following areas:

	Highly Effective			Ineffective	
a) Improving communication between the parties.	5	4	3	2	1
b) Clarifying viewpoints, interests, and positions.	5	4	3	2	1
c) Identifying realistic options and/or alternatives.	5	4	3	2	1
d) Reaching general understandings and agreements.	5	4	3	2	1
e) Reaching specific agreements.	5	4	3	2	1

2. Please grade the effectiveness of your performance in each of the following areas:

	Highly Effective			Ineffective	
a) I did a good job of explaining mediation.	5	4	3	2	1
b) I was fair and impartial.	5	4	3	2	1

- c) I understood the issues involved. 5 4 3 2 1
- d) I was a good listener. 5 4 3 2 1
- e) I asked relevant and insightful questions. 5 4 3 2 1
- f) I was effective at reducing tensions between the parties. 5 4 3 2 1
- g) I came up with helpful ideas. 5 4 3 2 1
- h) I was considerate of the parties' needs and goals. 5 4 3 2 1
- i) I kept the discussion directed at the main issues. 5 4 3 2 1
- j) I allowed the parties to express their point of view. 5 4 3 2 1
3. If your mediation session resulted in an agreement, please indicate your agreement or disagreement with the following:
- |  | Strongly Agree |         | Strongly Disagree |
|--|----------------|---------|-------------------|
| a) <u>Fairness</u> . The settlement was just and fair.                         | 5              | 4 3 2 1 |                   |
| b) <u>Durability</u> . The parties will live up to the terms of the agreement. | 5              | 4 3 2 1 |                   |
4. If your mediation session resulted in a total or partial agreement, in your opinion, would the case have settled prior to trial without mediation?
- | Yes | No |
|-----|----|
|-----|----|
5. If your mediation session did not result in a complete agreement, please indicate all issues in the following list that you attribute to lack of agreement:



- |                                     |                               |
|-------------------------------------|-------------------------------|
| a) Parties too far apart.           | g) Ineffective mediator.      |
| b) Inadequate settlement authority. | h) I did not want to mediate. |
| c) Lack of information.             | i) The other party did not    |
| d) Disagreement over facts.         | want to mediate.              |
| e) Disputed liability.              | j) I cannot identify any      |
| f) Party or counsel unprepared.     | factors.                      |

6. Were you satisfied with the mediation process?

Very  
Satisfied

Very  
Unsatisfied

5      4      3      2      1

7. Use back of page for additional comments, if any.

**APPENDIX D-2  
MEDIATION CENTER OF KENTUCKY, INC.  
PARTICIPANT'S EVALUATION OF MEDIATION**

Because we want to continue to improve our mediation program, your responses to this questionnaire are very important to us. Please take a few moments to answer these questions and return the form to us in the envelope provided.

**THE FOLLOWING SHOULD BE COMPLETED BY THE MEDIATION PARTICIPANT:**

Mediation Case #: \_\_\_\_\_ Name of Mediator(s) \_\_\_\_\_

Please circle your response(s) to the following questions.

1. Please grade the effectiveness of the mediation process in each of the following areas:

	Highly Effective			Ineffective	
a) Improving communication between the parties.	5	4	3	2	1
b) Clarifying viewpoints, interests, and positions.	5	4	3	2	1
c) Identifying realistic options and/or alternatives.	5	4	3	2	1
d) Reaching general understandings and agreements.	5	4	3	2	1
e) Reaching specific agreements.	5	4	3	2	1

2. Please grade the effectiveness of your mediator in each of the following areas:

	Highly Effective			Ineffective	
a) . . . did a good job of explaining mediation.	5	4	3	2	1
b) . . was fair and impartial.	5	4	3	2	1
c) . . understood the issues involved.	5	4	3	2	1
d) . . was a good listener.	5	4	3	2	1
e) . . asked relevant and insightful questions.	5	4	3	2	1
f) . . was effective at reducing tensions between the parties.	5	4	3	2	1
g) . . . came up with helpful ideas.	5	4	3	2	1
h) . . was considerate of the parties' needs and goals.	5	4	3	2	1
i) . . kept the discussion directed at the main issues.	5	4	3	2	1
j) . . allowed me to express my point of view.	5	4	3	2	1
3. If your mediation session resulted in an agreement, please indicate your agreement or disagreement with the following:					
	Strongly Agree			Strongly Disagree	
a) <u>Fairness</u> . The settlement was just and fair.	5	4	3	2	1
b) <u>Durability</u> . The parties will live up to the terms of the agreement.	5	4	3	2	1
4. If your mediation did not result in a complete agreement, please indicate all issues in the following list that you attribute to lack of agreement:					

- |                                     |   |
|-------------------------------------|---|
| a) Parties too far apart.           | g) Ineffective mediator.                    |
| b) Inadequate settlement authority. | h) I did not want to mediate.               |
| c) Lack of information.             | i) The other party did not want to mediate. |
| d) Disagreement over facts.         | j) I cannot identify any factors.           |
| e) Disputed liability.              |   |
| f) Party or counsel unprepared.     |   |

5. Were you satisfied with the mediation process?

Very  
Satisfied

Very  
Unsatisfied

5      4      3      2      1

6. Use back of page for additional comments, if any.

**APPENDIX D-3  
MEDIATION CENTER OF KENTUCKY, INC.  
ATTORNEY'S EVALUATION OF MEDIATION**

Because we want to continue to improve our mediation program, your responses to this questionnaire are very important to us. Please take a few moments to answer these questions and return the form to us in the envelop provided.

Case #: \_\_\_\_\_ Name(s) of Mediator(s) \_\_\_\_\_

**THE FOLLOWING SHOULD BE COMPLETED BY THE PARTICIPATING ATTORNEY**

Please circle your response(s) to the following questions.

1. My client brought the complaint . . . Yes No
2. The complaint was brought by another party . . . Yes No
3. At what stage in the litigation, if any, did the mediation occur?
  - a) Soon after the answer was filed and before substantial discovery.
  - b) After discovery was completed or substantially completed.
  - c) Around the time of the pre-trial conference.
  - d) On the "courthouse steps" with trial imminent.

4. Please grade the effectiveness of the mediation process in each of the following areas:

	Highly Effective			Ineffective	
a) Improving communication between the parties.	5	4	3	2	1
b) Clarifying viewpoints, interests, and positions.	5	4	3	2	1
c) Identifying realistic options and/or alternatives	5	4	3	2	1

- d) Reaching general understandings and agreements.      5    4    3    2    1
- e) Reaching specific agreements.      5    4    3    2    1
5. Please grade the effectiveness of your mediator in each of the following areas:

- |   | Highly<br>Effective |   |   | Ineffective |   |
|---|---------------------|---|---|-------------|---|
| a) The Mediator did a good job of explaining mediation.                 | 5                   | 4 | 3 | 2           | 1 |
| b) The Mediator was fair and impartial.                                 | 5                   | 4 | 3 | 2           | 1 |
| c) The Mediator understood the issues involved.                         | 5                   | 4 | 3 | 2           | 1 |
| d) The Mediator was a good listener.                                    | 5                   | 4 | 3 | 2           | 1 |
| e) The Mediator asked relevant and insightful questions.                | 5                   | 4 | 3 | 2           | 1 |
| f) The Mediator was effective at reducing tensions between the parties. | 5                   | 4 | 3 | 2           | 1 |
| g) The Mediator came up with helpful ideas.                             | 5                   | 4 | 3 | 2           | 1 |
| h) The Mediator was considerate of the parties' needs and goals.        | 5                   | 4 | 3 | 2           | 1 |
| i) The Mediator kept the discussion directed at the main issues.        | 5                   | 4 | 3 | 2           | 1 |
| j) The Mediator allowed me to express my point of view.                 | 5                   | 4 | 3 | 2           | 1 |

6. If your mediation session resulted in an agreement, please indicate your agreement or disagreement with the following:

	Strongly Agree					Strongly Disagree				
a) <u>Fairness</u> . The settlement was just and fair.	5	4	3	2	1					
b) <u>Durability</u> . The parties will live up to the terms of the agreement.	5	4	3	2	1					

7. If your mediation resulted in a total or partial agreement, in your opinion, would the case have settled prior to trial without mediation?

Yes                      No

8. If your mediation resulted in a total or partial agreement, please indicate the amount of court time you estimate would have been required to try the issues you settled.

- |                   |                     |
|-------------------|---------------------|
| a) 1 day or less. | f) 6 days.          |
| b) 2 days.        | g) 7 days.          |
| c) 3 days.        | h) 8 days.          |
| d) 4 days.        | i) 9 days.          |
| e) 5 days.        | j) 10 or more days. |

9. If your mediation did not result in a complete agreement, please indicate all issues in the following list that you attribute to lack of agreement:

- |                                     |   |
|-------------------------------------|---|
| a) Parties too far apart.           | g) Ineffective mediator.                    |
| b) Inadequate settlement authority. | h) I did not want to mediate.               |
| c) Lack of information.             | i) The other party did not want to mediate. |
| d) Disagreement over facts.         | j) I cannot identify any factors.           |
| e) Disputed liability.              |   |
| f) Party or counsel unprepared.     |   |

10. If the dispute remains unresolved, please describe what is being done to resolve it:

- a) Going back to court.
- b) Dispute dropped.
- c) Will return for future mediation.
- d) Nothing.

11. Were you satisfied with the Mediation process?

Very  
Satisfied

Very  
Unsatisfied

5

4

3

2

1

12. Use back of page for additional comments, if any.



FAYETTE \_\_\_\_\_ COURT  
CIVIL BRANCH  
\_\_\_\_\_ DIVISION

_____	PLAINTIFF
VS.	NO. _____
_____	DEFENDANT

MEDIATION REPORT

\* \* \* \* \*

The Mediation Center reports:

- \_\_\_\_\_(100)      That this matter was settled prior to mediation; or
- \_\_\_\_\_(200)      That this matter was settled through mediation; or
- \_\_\_\_\_(300)      That this matter was partially settled through mediation; or
- \_\_\_\_\_(400)      That this matter was not settled through mediation; or
- \_\_\_\_\_(500-01)    That this matter was not suitable for mediation.

\_\_\_\_\_  
DIRECTOR  
MEDIATION CENTER OF KENTUCKY, INC.